No. 98-1667-CFX Title: David H. Baral, Petitioner
v.
United States

Docketed: April 15, 1999 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Apr 13 1999	Petition for writ of certiorari filed. (Response due June 16, 1999)
	May 14 1999	Order extending time to file response to petition until June 16, 1999.
	Jun 10 1999	Brief of respondent United States filed.
	Jun 23 1999	DISTRIBUTED. September 27, 1999
	Aug 18 1999	Letter from the Solicitor General received and distributed.
	Sep 28 1999	Petition GRANTED. limited to the following Question: Whether a remittance of estimated taxes or of taxes withheld from wages is a payment of tax that is subject to the limitation on tax refunds set forth in Section 6511(b) of the Internal Revenue Code, 26 U.S.C. 6511(b). The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT January 18, 2000. **********
	Oct 15 1999	Motion of Solicitor General to dispense with printing the joint appendix filed.
	Oct 28 1999	Motion to dispense with printing the joint appendix DISTRIBUTED (October 29, 1999).
	Nov 1 1999	Motion of Solicitor General to dispense with printing the joint appendix GRANTED.
	Nov 10 1999	Brief of petitioner David H. Baral filed.
	Nov 19 1999	Record filed.
	Dec 1 1999	Record filed.
	Dec 6 1999	CIRCULATED.
	Dec 13 1999	Brief of respondent United States filed.
	Dec 30 1999	Reply brief of petitioner David H. Baral filed.
	Jan 18 2000	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 98 –

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

DAVID H. BARAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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4188

QUESTIONS PRESENTED

Did withholding and estimated income tax remittances, made by the taxpayer before his income tax return was filed and before his income tax liability was ascertained by the Internal Revenue Service or himself, constitute when deemed made payments of income tax for purposes of the statute of limitations on income tax refunds (Section 6511(b)(2)(A) of the Internal Revenue Code of 1986)?

This question requires the consideration of two subsidiary questions:

1. Does Section 6513(b)(1) and (2) of the Internal Revenue Code of 1986 provide that remittances of *withholding* tax and *estimated* tax shall be deemed, or converted into, payment of *income* tax on the income tax return due date?

3. Does Section 6513(b)(1) and (2) of the Internal Revenue Code of 1986 destroy or overrule the principle of the Supreme Court's decision in *Rosenman v. United States*, 323 U.S. 658 (1945), that a tax is not paid for the purposes of the statute of limitations on refunds before the tax is known and assessed?

PARTIES TO THE PROCEEDING

All the parties are named in the caption of the case.

STATEMENT PURSUANT TO RULE 29.6

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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No. 98 –

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

DAVID H. BARAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is set forth in its entirety in the Appendix hereto at A-1 to A-4. The Memorandum and Order of the United States District Court for the District of Columbia, affirmed by the Court of Appeals, is set forth in the Appendix hereto at A-5 to A-10.

JURISDICTION

The judgment of the Court of Appeals was filed on January 20, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the United States District Court was provided by 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422, and jurisdiction in the Court of Appeals, by 28 U.S.C.§ 1291.

STATUTES INVOLVED

26 United States Code (Internal Revenue Code of 1986) Sections 6511 and 6513(b)(1), (2) and (d) are reproduced in the Appendix hereto at A-11 to A-13.

STATEMENT OF THE CASE

This case turns on whether withheld amounts and an estimated tax payment constituted the payment of income tax when such withheld and estimated tax remittances were deemed paid to the IRS, or whether such remittances simply became creditable amounts awaiting future application to the income tax at a time when the income tax was determined or defined. If those transfers of funds to the IRS when deemed made (April 15, 1989) were payments of income tax (here overpayments), the excess over tax due is not refundable or

creditable because refund or credit is barred by the statute of limitations. The statute of limitations, however, does not apply to withholding and estimated taxes which were not, when deemed paid, payments of *income* tax computed and determined in accordance with Chapter 1 of Subtitle A of the Internal Revenue Code.

A. Statement of Facts

In the calendar year 1988, petitioner was employed, as he had been for many years, in the mailroom of *The Washington Post*. He had, before employment with *The Washington Post*, retired from service with the United States Government and he received in 1988 a pension based on that Government service. He also had dividend income and capital gains in 1988.

Withholding on petitioner's wages by *The Washington Post*, transmitted to the IRS by the *Post*, amounted to $4,104. Toward the end of 1988, when petitioner began to review his federal income tax posture, he became concerned that the withholding might be inadequate to meet his income tax obligation (yet to be computed and determined) for the year.

Petitioner prepared his own tax returns without professional aid or advice. He relied essentially on IRS instructions for the preparation of returns. He concluded that to avoid possible penalties and interest, he should remit additional funds to the IRS. Accordingly, in January 1989 he remitted $1,100 with an IRS Form 1040-ES (Estimated Tax Form). The remittance was recorded by the IRS on January 27, 1989.

On April 15, 1989, petitioner filed an Application for Automatic Extension of Time (IRS Form 4868) to file his 1988 income tax return, without making any additional remittance to the IRS. The filing of this Form extended the time to file his 1988 income tax return to August 15, 1989.

Petitioner was unable to find a copy of his 1987 federal income tax return or copies of IRS Forms 1099 (Information Returns) for 1988. He knew that he had a substantial capital loss carryover from 1987. He also knew that he had substantial capital gains and dividend income for 1988. It was necessary, in order to prepare a correct 1988 return, to determine the amount of investment income received and capital gains and the amount of the capital loss carryover. Therefore, he went to the Washington Area Office of the Internal Revenue Service and requested assistance and information for resolving the problem.

He did not receive the assistance or information sought through this request. He therefore could not complete a proper return on time. He was not particularly concerned because he believed that the amounts withheld and remitted would fully cover his income tax liability when that liability could be correctly determined.

Sometime in early 1993 he received a letter from the IRS stating that the IRS had no record of receiving his 1988 income tax return. He responded by reiterating his need for a copy of his 1987 income tax return and the 1988 data on Forms 1099, stating why the materials sought were necessary in order to prepare his 1988 return. This time the IRS provided copies of the 1987 return and the 1988 data.

On June 1, 1993 he filed his 1988 return. His tax as determined on the return was $4,029. Withholding taxes and

the estimated tax payment amounted to $5,204. The return therefore showed an overpayment of tax in the amount of $1,175, and petitioner requested on the return that this overpayment amount be treated as estimated tax for 1989. The return was audited by the IRS and determined to be completely correct sometime in the period between June 1, 1993 and December 6, 1993. The IRS, however, rejected the claim for credit on the ground that petitioner was deemed to have made his overpayment of income tax on April 15, 1989, a date more than three years and four months (the extension period) before the claim for credit (by return) was filed on June 1, 1993.

IRS records of petitioner's tax account for 1988 simply show "credits" for withholding and the estimated tax payment up to assessment of the income tax on July 19, 1993. Only upon assessment were the credits applied to the income tax.

B. Proceedings Below

The District Court below (Lamberth, J.) granted the Government's motion for summary judgment, holding that that Court lacked jurisdiction because petitioner's claim for credit, set forth in his 1988 tax return filed June 1, 1993, for overpayment of tax was out of time, *i.e.*, barred by the statute of limitations stated in Code Section 6511(b)(2)(A). The Court dismissed the complaint with prejudice. *See* Memorandum and Order, A-5. The District Court based its decision on "statutory language" (Code Section 6513(b)(1)) which, as construed by the Court, required withholding to be treated as payment of income tax on the return due date, April 15, 1989, and on "relevant case law" which caused the "estimated remittance" to be treated as payment of income tax on the return due date. The Court also accepted that the

Government had "definitively" distinguished the case of *Rosenman v. United States*, 323 U.S. 658 (1945), which otherwise would lead to a contrary result and decision.

Upon review, the Court of Appeals affirmed, holding (1) that the payments of withholding and estimated tax when deemed made were payments of income tax "as a matter of law," and (2) that the Supreme Court case of *Rosenman v. United States*, 323 U.S. 658 (1945), was irrelevant. A-3,4.

SUMMARY OF REASONS FOR GRANTING THIS PETITION

1. The United States Courts of Appeals have divided into three groups over the question of how to determine the starting date (tax payment) for the statute of limitations on overpayments and refunds of taxes. The standards of each group of courts conflict with the standards of the other groups. Yet the applicable federal tax law should apply uniformly throughout the States of the United States. Only this Court can provide a uniform standard and establish the law.

2. Cases presenting the specific issue here, or parallel issues turning on the same analysis, arise constantly.

3. Some Courts of Appeals, including the Court below, have circumscribed this Court's decision in *Rosenman v. United States*, 323 U.S. 658 (1945), obliquely and by indirection, on grounds of law which will not withstand analysis.

4. The Court of Appeals below, like some other Courts of Appeals, has plainly misinterpreted the pertinent statute here (Code Section 6513(b)) to reach an incorrect

result in this case. Misconstruction of a federal statute of broad application requires correction by the Supreme Court.

I. The Existing State Of The Law In The United States Courts Of Appeal Is Chaotic

The matter of whether a transfer of funds to the IRS when made is a payment of tax has been highly troublesome for the federal courts. The issue — sometimes stated in legal shorthand as one of "payment" of the tax or "deposit" — has been the ongoing subject of a great number of judicial decisions, which have in recent years divided the United States Circuit Courts of Appeals into three schools of analysis:

(1) Decisions, relying on the Supreme Court *Rosenman v. United States* (323 U.S. 658 (1945)) rationale which treats all funds paid as deposits until such time as tax is ascertained and assessed, at which time the statute of limitations on refunds or credits starts running. The application of the funds to the assessment gives rise to the payment or overpayment of tax at that time. *See, e.g., Thomas v. Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953); *United States v. Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956); *Plankinton v. United States*, 267 F.2d 278 (7th Cir. 1959); *New York Life Insurance Company v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. den.*, 118 S.Ct. 1559 (April 27, 1998).

(2) Decisions which construe the funds paid as payments of tax when made, or deemed made by statute. *See, e.g., United States v. Miller*, 315 F.2d 354 (10th Cir. 1963); *cert. den.*, 375 U.S. 824 (1963); *Weigand v. United* States, 760 F.2d 1072 (10th Cir. 1985); *Gabelman v. Commissioner*, 86 F.3d 609 (6th Cir. 1996); *Ott v. United*

States, 141 F.3d 1306 (9th Cir. 1998). This is the basis of the decision in this case by the District Court and Court of Appeals.

(3) Decisions which eschew both views stated above, in favor of a "facts and circumstances" examination of the intent of taxpayer in making payments and the treatment of funds received by the Internal Revenue Service. *See, e.g., Ewing v. United States*, 914 F.2d 499 (4th Cir. 1990), *cert. den.*, 500 U.S. 905 (1991); *Cohen v. United States*, 995 F.2d 205 (Fed. Cir. 1993); *Blatt v. United States*, 34 F.3d 252 (4th Cir. 1994); *cf. Fortugno v. United States*, 353 F.2d 429 (3d Cir. 1965), *cert. dismissed*, 385 U.S. 954 (1966).

The Supreme Court declined to provide any clarification or guidance in this area when it denied the Government's request for review by writ of certiorari of the case of *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. den.*, 118 S.Ct. 1559 (April 27, 1998). In that case the Court of Appeals upheld a claim of the taxpayer for recovery of a payment on the ground that the taxpayer's remittance on a deficiency, proposed by the Government but disputed by the taxpayer, was illegally held by the Government because assessment was not timely made. The case affirmed the continuing vitality of the Supreme Court decision in the *Rosenman* case, 323 U.S. 658 (1945).

As noted, the issue in these cases is usually formulated as simply one of "payment" versus "deposit." However, this dichotomy is misleading and inappropriate for the issue presented here, the characterization of withholding and estimated taxes. These coerced exactions are taxes in their own right, but not the *income* tax. Until these payments are applied to an income tax ascertained under Chapter 1 of Subtitle A of the Internal Revenue Code. they have

inherently the character of deposits and give rise only to credits against a future income tax.

The Courts below have held in this case that their decision is mandated by Code Section 6513(b)(1) and (2), which allegedly treat withholding taxes and estimated taxes as payments of *income* tax on the return due date. Some other courts have stated this view. These courts have attempted to distinguish and disregard the basic rationale of the Supreme Court case of *Rosenman v. United States*, by declaring that case to be "superseded" by statute. However, this position ignores the history of the key statutory provisions and, even more importantly, the structure of the Code, and the place therein of withholding taxes, estimated taxes, and income taxes, as well as the relationship of these taxes to each other. It also ignores the specific language of the Code section (Section 6513(b)) invoked for decision.

II. Statutory History Does Not Support the Construction by the Court Below of Code Section 6513(b)(1) and (2)

Before 1939, the internal revenue laws of the United States were stated in Revenue Acts, re-enacted with changes and revisions at two-year intervals ordinarily. In 1939 these laws were codified in more permanent form in the Internal Revenue Code of 1939 (Title 26 of the United States Code).

In 1942, the 1939 Code was amended by adding a new Section 322, which required withholding taxes on wages. Revenue Act of 1942, § 322. Subsection (e) of Section 322 deemed such taxes to be paid on the due date for filing the income tax return, then March 15 of the following year. In 1943 a further Code amendment was made requiring payments of estimated taxes and declaring presumptively that

both estimated taxes and withholding taxes were deemed to be paid "not earlier than" the income tax return due date. Current Tax Payment Act of 1943, § 4(b).

Two years later, in 1945, the United States Supreme Court decided the case of *Rosenman v. United States*, 323 U.S. 658. In that case, the taxpayers, executors of a decedent's estate, paid an amount "on account of the Federal Estate tax" on or about the due date for the estate tax return., December 25, 1934, in order to avoid penalties and interest, stating that the amount was paid under protest and duress. Some months later, on February 25, 1935, the executors filed the estate tax return. The executors filed a claim for refund of the difference between the payment and tax shown on the return as an overpayment. The claim was filed three years and three months after the taxpayers' payment. Relying on the 1939 Code provision which barred recovery of overpayments made more than three years before the filing of the claim for refund, the IRS denied the claim for refund.

On audit in the three years following the filing of the return, the IRS determined and assessed a deficiency of estate tax and collected additional monies. More than five years after the original payment by taxpayers, but some two years after assessment, executors filed a second claim for refund of part of their initial payment. This was also denied as time-barred, and the IRS was upheld by the Court of Claims.

A unanimous Supreme Court reversed the Court of Claims, holding that, until assessment of the tax, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted . . . . The tax obligation did not become defined until April 1938." (April 1938 was the time of assessment.) *Rosenman*, 323 U.S. at 662.

When the Internal Revenue Code of 1954 was enacted, Section 322(e) of the 1939 Code became Section 6513(b) of the 1954 Code. Although there is no indication that a substantive change was intended, the draftsmen of the 1954 Code substituted a flat income tax return filing date for deemed payment of withholding taxes and estimated taxes, instead of using the phrase "not earlier than."[1] They also provided that the income tax return due date for this purpose, April 15 of the following year, did not change because of an extension of time to file. Notably, there was no effort to change or overrule by legislation the basic holding in the *Rosenman* case. There is no reference to that case in the legislative history.

In 1966, Code Section 6513(b) was divided into two subparagraphs, (b)(1) and (b)(2) (and a new (b)(3) was added which has no application here). Foreign Investors Tax Act of 1966, § 105(f)(1).

The history of these statutes is significant in the following respects:

1. There was no attempt to "supersede" the *Rosenman* case.

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[1] The Senate Report accompanying the 1954 Code stated that Section 6513(b) "corresponds to existing law in that the presumptive date of the payment is the due date of the corporation or individual tax return." S. Rep. No. 83-1622, at 587 (1954); *see also* H.R. Rep. No. 83-1622, at 587 (1954); H.R. Rep. No. 83-1337, at 416 (1954) (implying that the only change was to move the "presumptive" date of payment from March 15 (pre-1954) to April 15).

2. There was no intention to eliminate the "presumptive" character of Section 6513's deemed payment on the return due date.

3. Section 6513 was an effort to synchronize the timing of payments of withholding taxes and estimated taxes, otherwise made at intervals during the taxable year, with the date on which 98% of taxpayers file their returns, *i.e.*, April 15 or the 15th day of the fourth month of the year following the taxable year. The section deals with the timing of payments of *withholding* and *estimated* taxes only. It does not undertake to revise the tax character of payments, *i.e.*, it does not convert payments of withholding tax or estimated tax into payments of *income* tax in a case where a return is not filed on the income tax return due date and the income tax is uncomputed and unknown on that date.

III. The Structure of the Code Does Not Support Treating Payments of Withholding Tax and Estimated Tax as Payments of Income Tax

The pattern of the Internal Revenue Code makes it plain that withholding taxes and estimated taxes are separate and distinct from income taxes.

The Internal Revenue Code has six Subtitles of which only one, Subtitle A, deals with income tax, although Subtitle F, dealing with Procedure and Administration, may be applicable to any tax under the Code, *e.g.*, the income tax or estate tax or excise taxes. Within Subtitle A, only Chapter 1 sets out the complicated and intricate rules for determining taxable income and the income tax, from definition of gross income to exclusions from gross income, from adjusted gross income to deductions and to taxable income, with special provisions for capital gains, mergers and acquisitions,

pension and profit-sharing plans, oil and other mineral interests, and rules for a host of other situations and transactions. *Nothing in Chapter 1, except Section 31(a) (providing a credit for withheld tax), has to do with withholding taxes or estimated taxes.*

Withholding taxes are governed by the provisions of Subtitle C, concerned with "Employment Taxes," and are dealt with in Chapter 24 thereof. Estimated taxes are governed by the rules of Subtitle F ("Procedure and Administration") and more particularly Sections 6654 and 6655 of Subchapter A of Chapter 64 dealing with "Additions to Tax, Additional Amounts, and Assessable Penalties."

Section 58 of the Internal Revenue Code of 1939 and Section 6015 of the Internal Revenue Code of 1954 required declarations of estimated tax by individual taxpayers. These sections also defined "estimated" tax as an estimate by the individual of the amount of income tax under Chapter 1, less an estimate of credits under Chapter 1. In 1984 some Code draftsman, apparently in the interest of tax simplification, decided that Section 6015 of the 1954 Code could be eliminated, and this was done. Tax Reform Act of 1984, § 412(a)(1). As a result, the present Code has no provision which *imposes* an estimated tax requirement, but it does have *penalty* provisions for failing to pay, or for underpaying, an estimated tax. I.R.C. § 6654.

The withholding tax sections impose an obligation on *employers* to withhold from compensation paid to employees and to pay to the IRS a percentage of wages determined primarily by the number of dependents claimed by the employee (but other ways of withholding are also authorized). The withholding tax provisions recognize special exemptions. Finally, the Code imposes special and

unique penalties for failure to withhold and pay over withholding "trust fund" amounts. *See, e.g.*, the 100% penalty under I.R.C. § 6672. The penalties imposed for non-compliance with the income tax law are quite different. *See, e.g.*, I.R.C. §§ 6651, 6662, and 6663. Similarly, the estimated tax penalty provisions, which specify various methods of estimating by which penalties may be avoided, are different from the income tax penalties.

Estimated tax, unlike income tax, cannot be assessed. I.R.C. § 6201(b)(1). Apparently, like a cash bond, estimated tax can only be "posted." *Cf.* Rev. Proc. 84-58, 1984-2 C.B. 501; Rev. Proc. 63-11, ¶¶ 402, 403, 1963-1 C.B. 497. This seems to have been the procedure followed in the instant case, that is, posting of credits until the return was filed (June 1993) and an assessment of income tax was entered (July 1993), *at which time* the estimated tax was applied to discharge the income tax liability.

Code Section 6315 provides that estimated tax payments are made "on account of" income tax. The Treasury Regulation interpreting this provision states that "[t]he aggregate amount of the payments of estimated tax should be entered *upon the income tax return for such taxable year as payments to be applied against the tax shown on such return.*" Treas. Reg. § 301.6315-1 (emphasis added).

In summary, withholding taxes and estimated taxes are tax regimes in their own right. While they were created to supplement the income tax, they are governed by their own unique rules and penalties. To treat them as the income tax, which is set out in Chapter 1 of Subtitle A of the Code, is an error.

IV. The Analysis of Code Section 6513(b) by the Court Below is Incorrect

Subsection (b)(1) of Section 6513 reads as follows:

> Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

The "tax" deemed paid in the subsection is the "tax actually deducted and withheld at the source," that is, the *withholding* tax, not the income tax. Thus, withholding tax payments made at monthly intervals during the taxable year are brought forward to the income tax return due date in the following year. The subsection does not purport to convert the withholding tax into income tax on the return due date; that is done on the income tax return. *Cf.* Treas. Reg. § 301.6315-1 (quoted p. 14 above).

In the case of estimated taxes, subsection (b)(2) of Section 6513 provides:

> Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

The tax dealt with here is an "amount paid as *estimated* income tax" (emphasis added). The installments of estimated tax, paid during the taxable year, are combined and deemed paid on the return due date. The subsection does not provide that the cumulative estimated taxes are converted into income tax where no income tax return is filed on the due date. That metamorphosis is impossible; the income tax remains undetermined and unknown without a return. *Rosenman v. United States*, 323 U.S. 658 (1945).

What these subsections do is synchronize the payment of withholding tax and estimated tax with the defined income tax liability shown on returns filed on the due date by 98% of all individual taxpayers. Internal Revenue Statistics of Income, *Individual Income Tax Returns, 1995*, at 5, 7. They thereby permit the discharge of income tax liability *pro tanto* when that liability is reflected in the return. As the Certificate of Assessments in this case demonstrates, when no return is filed on the due date, credits remain outstanding, income tax liability is *not* discharged, and assessment is not made until the time that the return is actually filed.

Otherwise, the statutory construction endorsed by the Court below would produce very strange results, contrary to good sense. On that construction there was an overpayment of income tax in the instant case on April 15, 1989. Of course, nobody, including petitioner, knew the amount of his income tax or the amount of overpayment on that date. Petitioner needed data, which came from the IRS much later, to prepare his return. Nevertheless, the Government implies, he should have at least filed a claim for refund of the unknown overpayment. This, of course, would be an invalid claim because *Flora v. United States*, 362 U.S. 145 (1960),

requires that the tax liability (unknown on the return due date) be fully paid as a prerequisite to the claim.[2]

If payment of income tax was made on April 15, 1989, the IRS could have assessed such payment. I.R.C. § 6213(b)(4). Why did it not? The answer is obvious; the IRS could not assess an amount as income tax when neither the IRS nor anyone else knew the amount of income tax; the IRS could only post credits reflecting the receipt of withholding and estimated taxes.

V. The Statutory Construction Endorsed by the Court Below Violates Due Process

The Court of Appeals asserts that Code Section 6513(b), as construed by it, supersedes and makes irrelevant *Rosenman v. United States*. Were there any validity to this construction, it would result in a statute that violates due process because it is arbitrary, capricious, and contrary to reality and good sense. Congress cannot, by irrebuttable "deeming," cause a payment of withholding tax or estimated tax to become a payment of an undetermined and unknown income tax.

Long ago the U.S. Supreme Court held unconstitutional, as a violation of the due process clause of the Fifth Amendment, legislation which created a conclusive and irrebuttable statutory presumption that transfers by a decedent within two years of his death were made "in

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[2] We note further that under the Treasury Regulations "in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made on the appropriate income tax return." Treas. Reg. § 301.6402-3(a)(1).

contemplation of death" (and therefore, were estate taxable). *Heiner v. Donnan*, 285 U.s. 312 (1932). The presumption was contrary to fact and reality. The Court observed that the statutory provision was "not taxation, but spoliation." The Court further declared that "an individual could not be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, a new and startling doctrine . . . ." *Id.* at 327.

The constitutional violation in the *Donnan* case was not greater than that accomplished by the construction of Section 6513(b) endorsed below. As the Supreme Court declared in the *Rosenman* case, by his remittance "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted . . . . The tax obligation did not become defined until April 1938 [at assessment]." *Rosenman*, 323 U.S. at 662. An Act of Congress cannot convert a payment of withholding or estimated tax into a payment of income tax before the income tax has been ascertained or defined in any way by any party.

VI. The Claim for Credit was Timely under Section 6513(d), and the Credit Should be Available, as Claimed, for the Year 1989

Code Section 6513(d) reads as follows:

> OVERPAYMENT OF INCOME TAX CREDITED TO ESTIMATED TAX.— If any overpayment of income tax is, in accordance with section 6502(b), claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year (whether or not claimed as a credit in return of estimated tax for such succeeding taxable year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year in which the overpayment arises.

In his tax return for 1988, petitioner claimed as a credit against estimated tax for the succeeding taxable year the overpayment reflected on the return, $1,175. Under the statutory provision quoted above, the overpayment is thereby "considered as a payment of the income tax for the succeeding taxable year," here the year 1989.

Petitioner is entitled to what he claimed on his return, a credit for the succeeding taxable year. Under the *Government's* statutory construction and Code Section 6513(d), his payment of tax was made on the due date for the 1989 return, April 15, 1990, and the payment is therefore within the three years and four months (extension on Form 4868) of the filing of his claim for credit, made on the return which was filed June 1, 1993. Code Section 6513(d) thus disposes of this case in petitioner's favor, however Section 6513(b)(1) and (2) may be interpreted.

The position set forth here under VI was presented to the Court of Appeals by court-appointed *amicus* below. It was completely omitted from consideration by the Court of Appeals in its analysis of the case.

CONCLUSION

The basic issue in this case is whether payment of withholding taxes or estimated taxes before an income tax return is filed, or before determination or assessment of the

income tax, constitutes the payment of the income tax. The answer should be plainly negative.

For the reasons set forth, petitioner respectfully asks that this petition for a writ of certiorari be granted.

Respectfully submitted,

David Baral

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Pro Se

APPENDIX

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5297 September Term, 1998

David H. Baral, 96cv01690

Appellant

v.

United States of America,

Appellee

Appeal from the United States District Court for the District of Columbia

Before: EDWARDS, *Chief Judge*, SILBERMAN and SENTELLE, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel. While the issues presented occasion no need for a published opinion, they

have been accorded full consideration by the Court. *See* D.C. Cir. R. 36(b). On consideration thereof, it is

ORDERED and **ADJUDGED**, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the accompanying memorandum. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 41(a)(1). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
FOR THE COURT:

Mark J. Langer, Clerk

David H. Baral v. U.S.A., 97-5297

MEMORANDUM

David H. Baral appeals from the judgment of the district court denying his claim for credit of an overpayment of income tax as barred by the applicable statute of limitations. For the tax year 1988, Baral's employer withheld $4,104 in income tax from his wages; Baral also remitted an additional $1,100 in estimated tax. Baral did not file his 1988 return, however, until 1993, at which time he reported an overpayment on his 1988 taxes of $1,175 and requested that that amount be refunded. The IRS denied the claim for a credit on the ground that it was barred by the statute of limitations under 26 U.S.C. § 6511(b)(2)(A) (1994), which limits the amount of credit or refund the taxpayer can receive to the amount of tax "paid" in the three years (plus the period of any extension of time for filing the return; in this case four months) preceding the filing of the claim.

Baral contends that the withheld income tax and the estimated tax remittance were not "payments" so as to fall under the limitations of § 6511(b)(2)(A) but instead were merely "deposits" against potential liability. This argument, however, is foreclosed by the plain language of the statute. Section 6513(b)(1) provides that any amount of tax withheld from wages is "deemed to have been paid" by the recipient of the income on April 15 of the following year. Similarly, § 6513(b)(2) provides that any amount paid as estimated income tax shall be "deemed to have been paid" on April 15 of the following year. That Baral may have intended the remittances to be deposits rather than payments under § 6513 is irrelevant; the statute conclusively determines that these remittances were payments as a matter of law. Baral's reliance

on *Rosenman v. United States*, 323 U.S. 658 (1945) is similarly misplaced. *Rosenman* simply has no relevance to situations, such as the case here, involving a statutorily defined payment. As such, Baral is barred from recovering anything on his claim because his taxes for 1988 had all been paid more than three years and four months before he filed his claim, and the district court correctly granted summary judgment to the government.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID H. BARAL, Plaintiff v. THE UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 96-1690

MEMORANDUM AND ORDER

This matter comes before the court on the defendant's motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56. Upon consideration of the parties' submissions and the relevant law, for the reasons set forth below, the court will grant defendant's motion for summary judgment.

I.

BACKGROUND

During tax year 1988, while employed with the Washington Post, $4,104.00 was withheld from plaintiff Mr. Baral's wage earnings. Dep. at 4, l. 7; 16, l. 3. Without knowing at that time what his exact tax liability was to be for tax year 1988, Mr. Baral sent an estimated payment for an

additional $1,100.00 to the Philadelphia Service Center of the Internal Revenue Service ("IRS") along with a Form 1040-ES, in January of 1989. Interrog. at 6; Dep. at 16, 11. 6-20 and 22, 11. 10-11. Mr. Baral submitted IRS Form 4868 in April, 1989, and was granted a filing extension until August 15, 1989. Dep. at 8, 11. 12-22 and 9, 11. 1-9. This was the only Form 4868 filed by Mr. Baral for an extension. Dep. at 10, 11. 6-9.

Anticipating a significant 1987 capital loss carryover that would be applied to 1988, Mr. Baral assumed that he would ultimately be in line for a 1988 tax refund. Dep. at 15, 11. 1-9. However, unsure of whether the withholdings were going to be sufficient and without knowledge of the exact capital loss carryover amount, Mr. Baral sent the $1,100 so as to avoid penalties and interest. Dep. at 19, 11. 2-9, and 22, 11. 12-14.

Mr. Baral did not file his 1988 tax return until June, 1993. Dep. at 1, 1. 16. He attributes the untimely filing of the 1988 return to the fact that he had lost or misplaced records necessary to prepare the return. Dep. at 10, 11. 18-22, and 11, 11. 1-20. He did make some attempt to get the information, through a request for a file transfer from the Philadelphia office to the Washington, D.C. office. Dep. at 12, 11. 3-8. That request was not satisfied. Id. The necessary information was provided by the IRS in June, 1993. Pl.'s Opp. at 2.

At the time of the June, 1993 tax filing, Mr. Baral sought a credit for $1,175.00, to be applied to his 1989 return. Dep. at 6, 11. 15-21. The IRS denied the claim, noting that statute of limitations had run. Compl. at 2. The instant action is based on Mr. Baral's assertion that this statute of limitations does not apply because his $5,204.00 of remittances were "deposits," not "payments." Compl. at 2.

II.

STANDARDS OF REVIEW

Federal Rule of Civil Procedure

Summary judgment must be granted in favor of the moving party when there is no genuine issue of material fact and the moving party is entitled to such judgment as a matter of law. Fed. R. of Civ. Proc. 56. The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When this burden is met, the non-moving party is then responsible for demonstrating that there is a genuine issue for trial. Id.

Statutory Provisions

Commonly known as the Internal Revenue Code, 26 U.S.C. Section 6511 states that the limitations periods established are jurisdictional in nature and cannot be waived. In relevant part, subsection 6511(a) allows claims for credit to be filed within 3 years from time return was filed, or 2 years from time taxes were paid, whichever expires later. 26 U.S.C. Section 6511. In addition, subsection 6511(b)(2)(A) limits the amount of credit such that it will not exceed amounts paid within 3 years preceding that credit claim filing. Id.

Internal Revenue Code Section 6513 states that taxes withheld and deducted at the source during any calendar year are considered to have been paid on April 15 of the next year. 26 U.S.C. Section 6513 (b)(1). Finally, sections 6072 and 6315 indicate that estimated payments are deemed to be paid on April 15 of the following calendar year

III.

ANALYSIS

The fundamental issue before this court is whether the remittances made by the plaintiff are to be considered "deposits" or "payments" as they relate to the applicable statute of limitations. The defendant's arguments present a very persuasive basis on which to deem the remittances as payments, based on case law and statutory language. Namely, income tax withholdings and estimated tax payments are "payments" and not "deposits."

The defendant correctly anticipates Mr. Baral's use of Rosenman, in which the Supreme Court, considering an arrangement between the taxpayer and the IRS, viewed the remittance to estate taxes as a deposit. Rosenman v. United States, 323 U.S. 658, 662 (1945). However, the defendant definitively distinguishes Rosenman from the instant case by virtue of there being no agreement of any sort between Mr. Baral and the IRS. Furthermore, the defendant points to the Rosenman decision and the line of cases following it as pre-dating the aforementioned relevant subsections of 26 U.S.C. Section 6513. According to those statutory provisions, Congress clearly intended for remittances made by April 15 of a given calendar year -- $1,100 in January, 1989 -- to be considered as taxes paid and applicable to the liability for the preceding taxable year. Mr. Baral, in citing Rosenman, cannot even point to any analogous arrangement between himself and the IRS in which he indicated that he wished remittance to be held as cash bond or "deposit."

Mr. Baral also cites Ameel v. United States, 426 F.2d 1270 (6th Cir. 1970), quoting the court as follows: "In general, a tax is considered 'paid' for purposes of the running of the periods of limitations when a taxpayer files his return, accompanied by his payment." Ameel at 1272. That case involved government assessment of further estate taxes due three years after the original return was filed. A 1965 refund claim based on excessive 1963 government assessment and related to the statute of limitations was the central issue.

At the time the 1963 remittance was paid, to cover a government-computed deficiency, a Treasury Form 1962 was prepared by the IRS agent. Id. at 1271. This Advance Payment Record had two purposes. The agent could have instructed government to either (1) cash the check and hold as cash bond against repayment to taxpayer upon request and if remittance was later found to exceed tax liability; or (2) process the check and assess as payment. Id. The agent undertook the latter instruction rather than the arrangement possible under the former. The court therefore held that payment had been made effective February 7, 1963. The February 9, 1965 refund claim was found to be outside the applicable two-year statute of limitations. While not directly on point, Ameel is actually applicable to the defense's argument that his remittances are to be considered as payments effective February 7, 1963, due to lack of special arrangement with the government.

IV.

CONCLUSION

There is no genuine issue of material fact present in this case. The remittances made by Mr. Baral are to be considered

"payments" for his 1988 tax liability. The statutory language clearly commands that taxes withheld and deducted at the source in any calendar year are to be considered as payment effective April 15 of the next year. The remittances of $4,104.00 withheld by the Washington Post are therefore to be viewed at "payment" effective April 15, 1989.

Relevant case law provides ample authority for viewing the estimated remittance of $1,100.00 as "payment" rather than "deposit." Rosenman is distinguished from the instant case by virtue of an arrangement between the taxpayer and the IRS. Likewise, the Ameel court affirmed the trial court's holding of the refund claim being outside the two-year limitation window. Again, there is the absence of any arrangement that would arguably change the effective date of payment. The defendant has effectively demonstrated a lack of genuine issue of fact in this case. Therefore, this court grants the defendant's motion for summary judgment. The complaint herein is hereby DISMISSED WITH PREJUDICE.

SO ORDERED.

Royce C. Lamberth
United States District Judge

STATUTES INVOLVED

INTERNAL REVENUE CODE (26 U.S.C.)

SEC 6511. LIMITATIONS ON CREDIT OR REFUND

(a) PERIOD OF LIMITATION ON FILING CLAIM. -- Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of any overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) LIMITATION ON ALLOWANCE OF CREDITS AND REFUNDS. --

(1) Filing of Claim within Prescribed Period. No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by taxpayer within such period.

(2) Limit on Amount of Credit or Refund. --

(A) *Limit Where Clam Filed Within 3-Year period.* -- If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time

for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) *Limit Where Claim Not Filed Within 3-Year Period.* -- If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

* * * * *

SEC 6513. TIME RETURN DEEMED FILED AND TAX CONSIDERED PAID.

(b) PREPAID INCOME TAX. -- *For purposes of section 6511 or 6512.* --

(1) Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under Section 31.

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without period to any extension of time for filing such return).

* * * * *

(d) Overpayment of Income Tax Credited to Estimated Tax. -- If any overpayment of income tax is, in accordance with section 6402(b), claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year (whether or not claimed as a credit in the return of estimated tax for such succeeding taxable year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year in which the overpayment arises.

Supreme Court, U.S.
FILED
JUN 10 1999
CLERK

(2)

No. 98-1667

In the Supreme Court of the United States

DAVID H. BARAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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2518

QUESTION PRESENTED

Whether a remittance of estimated taxes or of taxes withheld from wages is a payment of tax that is subject to the limitation on tax refunds set forth in Section 6511(b) of the Internal Revenue Code, 26 U.S.C. 6511(b).

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In the Supreme Court of the United States

No. 98-1667

DAVID H. BARAL, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The judgment and memorandum of the court of appeals (Pet. App. A1-A4) and the opinion of the district court (Pet. App. A5-A10) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1999. The petition for a writ of certiorari was filed on April 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 6151, 6315, 6401, 6402, 6511, and 6513 of the Internal Revenue Code, 26 U.S.C. 6151, 6315, 6401, 6402, 6513, and of 26 C.F.R. 301.6402-3 are set forth at App., *infra*, 1a-7a.

STATEMENT

1. During 1988, petitioner's employer withheld a total of $4104 in federal income taxes from petitioner's wages and remitted those taxes to the United States. In January 1989, petitioner made an additional remittance to the United States of $1100 as an estimated tax for the fourth quarter of 1988. Petitioner thereafter sought and was granted an extension of time to August 15, 1989, in which to file his 1988 income tax return. He did not file his return for that year, however, until June 1, 1993 (Pet. App. A3, A5-A6).

On the untimely 1988 return that petitioner filed in 1993, he claimed that his 1988 taxes had been overpaid by $1175 and sought to have that overpayment credited against his outstanding tax obligations for 1989. The Internal Revenue Service assessed the tax liability reported by petitioner on his belated 1988 return but denied the requested credit of the overpayment (Pet. App. A3, A6). The Service concluded that the requested credit was barred by Section 6511(b) of the Internal Revenue Code, which specifies that "the amount of [any] credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return." 26 U.S.C. 6511(b)(2)(A). Because petitioner's refund claim was filed after the period described in Section 6511(b)(2)(A) had expired, no credit or refund could be allowed on the untimely claim.

2. Petitioner thereafter commenced this refund suit in federal district court. Petitioner claimed that the withheld and estimated tax remittances made with respect to his 1988 liability were "deposits" rather than "payments" of tax and that the statutory limitations on

the recovery of taxes based upon the time "the tax [was] paid" (26 U.S.C. 6511(b)(2)(A)) therefore did not bar his refund claim (Pet. App. A3, A6).

The district court rejected petitioner's claim. The court held that the remittances of withholding and estimated taxes were "payments" of tax that were subject to the statute of limitations. Because the refund claim was not made within the period permitted under Section 6511, the court held that petitioner's claim was barred by the plain text of the statute (Pet. App. A8).[1]

In so ruling, the court rejected petitioner's reliance on the decision of this Court in *Rosenman* v. *United States*, 323 U.S. 658 (1945). The court explained (Pet. App. A8) that *Rosenman* is premised on the existence of an "interim arrangement" between the taxpayer and the Internal Revenue Service under which money is remitted and "held not as taxes duly collected * * * but as a deposit in the nature of a cash bond" (323 U.S. at 662). In the present case, petitioner cannot "point to any analogous arrangement between himself and the IRS in which he indicated that he wished [the] remittance to be held as cash bond or 'deposit'" (Pet. App. A8).

3. The court of appeals affirmed (Pet. App. A1-A4). The court held that the contention that the remittances of withheld and estimated taxes were deposits rather than payments of tax is "foreclosed by the plain language of the statute" (*id.* at A3):

> Section 6513(b)(1) provides that any amount of tax withheld from wages is "deemed to have been paid" by the recipient of the income on April 15 of

---

[1] Petitioner's tax return, which functioned as his claim for credit or refund, was filed more than four years after the remittances of withheld and estimated taxes (Pet. App. A6).

> the following year. Similarly, § 6513(b)(2) provides that any amount paid as estimated income tax shall be "deemed to have been paid" on April 15 of the following year.

The court concluded that the remittances of withheld and estimated taxes "were payments as a matter of law" under the plain text of these statutory provisions (Pet. App. A3). The court explained that the rationale of *Rosenman* does not apply to a case, such as the present one, which involves a "statutorily defined payment" rather than a consensual deposit arrangement (*id.* at A4).

DISCUSSION

The court of appeals correctly held that a withholding tax remittance and a quarterly estimated tax payment constitute payments of tax that are governed by the statutory limitations on recovery set forth in Section 6511 of the Internal Revenue Code. Such remittances are not made under the type of consensual deposit arrangement addressed by this Court in *Rosenman* v. *United States*, 323 U.S. 658 (1945).

As the petition correctly notes, however, the courts of appeals have long been in disarray in their interpretation and application of *Rosenman*. In particular, the decision in the present case is in direct conflict with the holding of the Fifth Circuit in *Harden* v. *United States*, 76 A.F.T.R. 2d (P-H) 95-7980 (Nov. 30, 1995), that estimated tax remittances made prior to assessment are merely "deposits," not payments of tax.[2] This

[2] In *Harden*, the Fifth Circuit held that an estimated tax payment submitted with an application for an extension of time for the filing of a return is only a "deposit," and not a "payment" of tax, under the binding precedents of that circuit. In *Thomas* v. *Mercantile National Bank*, 204 F.2d 943 (1953), and *Ford* v. *United States*, 618 F.2d 357 (1980), the Fifth Circuit interpreted *Rosenman* to signify that "an amount remitted before an assessment of tax is, as a matter of law, a deposit" rather than a payment of tax. *Harden* v. *United States*, 76 A.F.T.R. 2d (P-H) at 95-7981. Especially in view of the fact that the decision in *Harden* relied on preexisting circuit precedent, the fact that the *Harden* decision is not officially reported is of "no weight in [this Court's] decision to review the case" (*Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987)).

longstanding confusion and uncertainty among the courts of appeals concerning the proper application of the principles established in *Rosenman* can, of course, be resolved only by this Court. The proper application of the statutory provisions that limit tax refunds is a matter of substantial importance that gives rise to a significant volume of litigation. Review by this Court of this continuing conflict among the circuits is therefore warranted.

1. a. Section 6511(b) of the Internal Revenue Code imposes "substantive limitations on the amount of recovery" on tax refund claims. *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997). These substantive limitations are set forth in "unusually emphatic form." *Id.* at 350. When, as in the present case, a refund claim is filed within three years of the filing of the return, the statute specifies that (26 U.S.C. 6511(b)(2)(A)):

> the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return * * * .

Because all of petitioner's withholding and estimated tax remittances were made more than four years before his return and refund claim were filed (see note 1,

supra), the court of appeals correctly held that none of those payments may be refunded "under the plain language of the statute" (Pet. App. A3).

b. Petitioner errs in claiming that his withholding and estimated tax payments should be treated as "deposits" rather than as "payments" of tax and that the statutory limitations on the recovery of taxes "paid" to the United States (26 U.S.C. 6511(b)(2)(A)) therefore do not bar his claim in this case. The distinction that petitioner posits between tax "deposits" and tax "payments" finds no support in the Internal Revenue Code. The Code, which strictly regulates tax refund suits "in a highly detailed technical manner" (*United States* v. *Brockamp*, 519 U.S. at 350), contains no mention whatever of tax "deposits." Instead, in language that "cannot easily be read as containing implicit exceptions" (*ibid.*), Section 6511(b) comprehensively establishes unqualified limitations on the recovery of any taxes "paid" in any manner to the United States.

In *Rosenman*, however, the Court drew a distinction between a remittance tendered as a "payment" of tax—which triggers the limitations applicable to tax refund suits—and a remittance tendered as a "deposit" —which is not subject to those limitations.[3] Based upon what the Court concluded was then-prevailing administrative practice, the Court held in *Rosenman* that a "deposit" occurs when a remittance is tendered to the

[3] As the Federal Circuit stated in *New York Life Insurance Co.* v. *United States*, 118 F.3d 1553, 1556 (1997), cert. denied, 523 U.S. 1094 (1998):

> The Code does not deal with deposits of taxes or provide procedures for their making or recovery. The concept of a "deposit" of taxes, which is not a payment, stems from the Supreme Court's decision in *Rosenman* * * * .

government as part of an "interim arrangement" to cover "future" contingencies and is not tendered to "discharge * * * a liability" or to "pay one that was asserted." 323 U.S. at 662.[4] The Court stated in *Rosenman* that the government had given a "practical construction * * * [t]o such arrangements" and "does not consider" such advances from the taxpayer to constitute "tax payments." *Ibid.* The Court concluded that it merely "interpret[s] a business transaction according to its tenor" to recognize that "receipt by the Government of moneys under such an arrangement" constitutes a "deposit" rather than a "payment" of tax. *Id.* at 662, 663.[5] The rationale of *Rosenman* is thus that a "deposit" (rather than a "payment") occurs when the taxpayer and the government have expressly or impliedly agreed to a "business transaction" or "arrangement" under which the remittance is tendered by the taxpayer, and accepted and treated by the government, as a "deposit * * * in the nature of a cash bond." *Id.* at 662.

[4] The Court reasoned in *Rosenman* that a taxpayer would enter into such a "deposit arrangement" to stop the running of penalties and interest and that the government, in exchange, would thereby obtain a "cash bond for the payment of taxes thereafter found to be due." 323 U.S. at 662.

[5] In *Rosenman*, unlike in the present case, the remittance had been accompanied by a letter stating that it was made "under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the [taxpayer] that not all of this sum is legally or lawfully due." 323 U.S. at 660. The Service placed the remittance in *Rosenman* in a non-interest bearing "suspense account" to the credit of the estate. It was in this context that the Court concluded in *Rosenman* that an implied "business transaction" or "arrangement" had been made between the taxpayer and the government to treat the remittance as a "deposit * * * in the nature of a cash bond." *Id.* at 662.

In the present case, however, there was plainly no consensual deposit "arrangement" between the taxpayer and the government of the type described by the Court in *Rosenman*. See note 5, *supra*. Indeed, there were no communications of any type between the taxpayer and the government concerning the treatment to be given these remittances. Moreover, the statutes under which the remittances were made specify that any "tax withheld from wages" or "paid as estimated income tax" for any year "shall be 'deemed to have been paid' on April 15 of the following year" (Pet. App. A3, quoting 26 U.S.C. 6513(b)(1)-(2)). As the court of appeals concluded in this case, remittances of withheld and estimated taxes constitute "payments as a matter of law" under these statutory provisions (Pet. App. A3).

Following this Court's decision in *Rosenman*, the Treasury Department adopted rules that set forth the specific circumstances and conditions under which the government will accept a remittance as a consensual "deposit" rather than a "payment" of taxes (Rev. Proc. 84-58, 1984-2 C.B. 501; see also Rev. Rul. 89-6, 1989-1 C.B. 119; Rev. Proc. 82-51, 1982-2 C.B. 839). Those conditions—which include a requirement that the taxpayer expressly designate the remittance as a "deposit"—were plainly not met in this case.[6] See Pet. App. A6. In this context, there was manifestly no express nor implied-in-fact consensual "business transaction" or "arrangement" between the taxpayer and the

[6] Under the procedures specified by the Treasury, a taxpayer—typically one under audit who expects to receive an adverse determination—must expressly designate the remittance as a deposit. A deposit thus made is returnable on demand, without interest, until such time as the Service is authorized to make the assessment. Rev. Proc. 84-58, §§ 401.3, 402.1, 1984-2 C.B. at 502.

United States for a "deposit" rather than a "payment" to be made. The essential prerequisites for application of this Court's decision in *Rosenman* are thus not satisfied in this case. Petitioner's refund claim must therefore be denied because, in filing his belated claim, he failed to "conform strictly to the requirements of Congress." *Rosenman* v. *United States*, 323 U.S. at 661.

2. The courts of appeals have adopted distinct and conflicting lines of authority in their effort to interpret and apply this Court's decision in *Rosenman*.

a. The most extreme position, which most courts have rejected, is that taken by the Fifth Circuit. That circuit holds that any remittance made prior to the formal assessment of the tax "is, as a matter of law, a deposit" rather than a payment of tax. *Harden* v. *United States*, 76 A.F.T.R. 2d (P-H) at 95-7981. In *Harden*, the court applied that rationale in holding, in direct conflict with the decision in the present case, that an estimated tax remittance "forwarded to the IRS before an assessment of tax is to be considered a deposit rather than a payment." *Ibid.* See also *Thomas* v. *Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953); *Ford* v. *United States*, 618 F.2d at 357.[7]

[7] The Federal Circuit has adopted a close variant of the Fifth Circuit rule. In *New York Life Insurance Co.* v. *United States*, 118 F.3d 1553, 1559 (Fed. Cir. 1997), cert. denied, 523 U.S. 1094 (1998), the court held that a remittance must be treated as a deposit "as a matter of law" when it is tendered before the tax is assessed and with an accompanying "protest" of the underlying liability. As the Seventh Circuit correctly concluded in rejecting that same contention in *Moran* v. *United States*, 63 F.3d 663, 669 (1995), however, the fact that a "protest" accompanies the remittance cannot transmute a payment into a deposit, for the Code expressly

The Fifth Circuit has reasoned that a tax liability cannot be "paid" by a remittance made before the tax is assessed because, absent an assessment, there is "no liability on the part of the taxpayer, and consequently nothing to pay." *Thomas* v. *Mercantile National Bank*, 204 F.2d at 944. That reasoning, however, is fundamentally flawed. The underlying liability to pay a tax exists independently of "assessment or notice and demand from the Secretary" (26 U.S.C. 6151(a)). An assessment is simply the administrative act of "recording the liability of the taxpayer in the office of the Secretary" (26 U.S.C. 6203).[8] As the Seventh Circuit held in *Moran* v. *United States*, 63 F.3d 663, 666-667 (1995), an "assessment" is a prerequisite for various administrative collection activities, but "the liability of the taxpayer" exists independently of, and precedes, the formal assessment of the tax. See 26 U.S.C. 6151(a) ("the person required to make such return shall, *without assessment* or notice and demand from the Secretary, *pay* such tax * * * at the time and place fixed for filing the return") (emphasis added)).[9]

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specifies that taxes may be "*paid* under protest" (26 U.S.C. 7422(b) (emphasis added)).

[8] The Internal Revenue Service generally does not make an assessment of tax until the taxpayer has filed his return and the return has been processed administratively. Under the Fifth Circuit's rule, all withholding taxes, estimated taxes, and even remittances accompanying tax returns would merely be "deposits" until the Service processes the return and makes an assessment of the amounts due.

[9] Similarly, the Code provides that a tax collection suit may be brought by the government "without assessment" of the tax. 26 U.S.C. 6501(a) (& Supp. III 1997). As this Court concluded in *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, 565 (1950), on the date the return is required to be filed, "the taxpayer has a positive obligation to the United States: a duty to pay its tax."

b. The rule adopted by the Fifth Circuit conflicts with the decisions of the Ninth Circuit in *Zeier* v. *Internal Revenue Service*, 80 F.3d 1360 (1996), the Seventh Circuit in *Moran* v. *United States*, 63 F.3d at 667-668 (1995), the Fourth Circuit in *Ewing* v. *United States*, 914 F.2d 499, 502-503 (1990), cert. denied, 500 U.S. 905 (1991), the Sixth Circuit in *Ameel* v. *United States*, 426 F.2d 1270, 1273 (1970), the Third Circuit in *Fortugno* v. *Commissioner*, 353 F.2d 429 (1965), cert. dismissed, 385 U.S. 954 (1966), and the Second Circuit in *Lewyt Corp.* v. *Commissioner*, 215 F.2d 518, 522-523 (1954), judgment aff'd in part and rev'd in part on another issue, 349 U.S. 237 (1955). These courts have consistently rejected the conclusion of the Fifth Circuit that "there can be no payment of tax before the IRS makes a formal assessment of the * * * tax liability" (*Zeier* v. *Internal Revenue Service*, 80 F.3d at 1364)). They have held instead that the "facts and circumstances" of each case must be considered in determining whether the parties intended the remittance to be treated as a payment or as a deposit.[10]

Other courts, including the court of appeals in the present case, have adopted still another method of analysis that looks to the specific statutory provision under which the remittances were made to determine

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[10] In *United States* v. *Dubuque Packing Co.*, 233 F.2d 453 (1956), the Eighth Circuit followed the Fifth Circuit's decision in *Mercantile National Bank* in holding that a remittance held by the IRS in a suspense account did not constitute a payment until the tax was formally assessed. In *Essex* v. *Vinal*, 499 F.2d 226 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975), however, without discussing its prior decision in *Dubuque Packing Co.*, the Eighth Circuit held that a remittance of estimated taxes prior to assessment constituted a payment when the taxpayer and the IRS treated it as such.

whether the "remittances were payments as a matter of law" (Pet. App. A3). These courts have held that certain specific types of remittances—such as estimated tax payments and wage withholdings—constitute a "payment" rather than a "deposit" as a matter of law, even in the absence of any prior assessment of the tax and even in the face of a contrary expression of intent by the taxpayer.[11] See, *e.g.*, *Ertman* v. *United States*, 165 F.3d 204 (2d Cir. 1999) (estimated taxes); *Ott* v. *United States*, 141 F.3d 1306, 1309–1310 (9th Cir. 1998) (same); *Gabelman* v. *Commissioner*, 86 F.3d 609, 612–613 (6th Cir. 1996) (same); *Weigand* v. *United States*, 760 F.2d 1072 (10th Cir. 1985) (same); *Ehle* v. *United States*, 720 F.2d 1096 (9th Cir. 1983) (wage withholdings). These decisions have concluded that the question whether the taxpayer "intended" withheld taxes or estimated taxes to be a "deposit" is irrelevant because Section 6513(b) of the Code specifies that such taxes are "deemed to be paid" on the date the return for that year is due. See 26 U.S.C. 6513(b)(1)-(2); *Ott* v. *United States*, 141 F.3d at 1309-1310; *Ehle* v. *United States*, 720 F.2d at 1097; note 11, *supra*. As the court of appeals stated in this case, Section 6513(b) "conclusively determines that these remittances [of withholding and estimated taxes] were payments as a matter of law" (Pet. App. A3).[12]

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[11] The Ninth Circuit held in *Zeier* v. *Internal Revenue Service*, 80 F.3d at 1364, that a taxpayer's ostensible intent to make a deposit can not "defeat a statutory mandate" that the remittance be regarded as a payment of tax.

[12] Petitioner raises three additional arguments on the merits, each of which lacks substance. Petitioner first attempts to distinguish between "payments of withholding tax or estimated tax" and "payments of *income* tax" (Pet. 12). Withholding and estimated taxes, however, are simply devices for collecting income taxes, and they are refundable only to the extent that they result in an overpayment of income tax. See, *e.g.*, 26 U.S.C. 6315 ("[p]ayment of the estimated tax * * * shall be considered payment on account of the income taxes imposed by subtitle A for the taxable year"); 26 U.S.C. 31(a)(1) (amount withheld as tax from wages is credited against income tax liability).

Petitioner erroneously asserts (Pet. 17) that application of the statutory refund limitations to his claim violates due process of law. As this Court stated in *United States* v. *Dalm*, 494 U.S. 596, 609-610 n.7 (1990), "[t]he very purpose of statutes of limitations in the tax context is to bar the assertion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar."

Petitioner further errs in relying (Pet. 18-19) on Section 6513(d), which specifies that an overpayment of estimated tax that is "claimed as a credit" in one year "shall be considered as a payment of the income tax for the succeeding taxable year" (26 U.S.C. 6513(d)). That statute does not convert an untimely claim for a credit in one year into a timely "payment" of tax for the next year. Since, under Section 6511(b)(2)(A), petitioner had no lawful right to a credit for 1988, there was no credit available from that year to apply to the following year's taxes under Section 6513(d).

3. The proper classification of a remittance as a payment or deposit is a question of recurring importance on which the courts of appeals have adopted conflicting analyses that have yielded inconsistent results. The Internal Revenue Service "processes more than 200 million tax returns each year [and] issues more than 90 million refunds." *United States* v. *Brockamp*, 519 U.S. at 352. These millions of taxpayers, and the Service as well, need a secure basis for understanding the consequences that follow from remittances of taxes to the United States. Only this Court can resolve the recurring conflict that exists among the courts of

appeals on the application of this Court's *Rosenman* decision to these fundamental issues of tax administration. Resolution of that conflict by this Court is needed to avoid continuing uncertainty and disparate application of the revenue laws.[13]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1999

[13] For essentially the same reasons, the United States petitioned for a writ of certiorari from the Federal Circuit's decision in *New York Life Insurance Co.* (see note 7, *supra*), but this Court denied review. 523 U.S. 1094 (1998). The conflict in the circuits persists, however, and remains of recurring importance.

APPENDIX

1. Section 6151(a) of the Internal Revenue Code, 26 U.S.C. 6151, provides in relevant part:

> Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

* * * * *

2. Section 6315 of the Internal Revenue Code, 26 U.S.C. 6315, provides in relevant part:

> Payment of the estimated income tax, or any installment thereof, shall be considered payment on account of the income taxes imposed by subtitle A for the taxable year.

3. Section 6401 of the Internal Revenue Code, 26 U.S.C. 6401, provides in relevant part:

> (a) The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

(b)(1) If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, and D of such part IV), the amount of such excess shall be considered an overpayment.

* * * * *

4. Section 6402 of the Internal Revenue Code, 26 U.S.C. 6402, provides in relevant part:

(a) In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c) and (d), refund any balance to such person.

(b) The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

* * * * *

5. Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511, provides in relevant part:

(a) Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b)(1) No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2)(A) If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

* * * * *

6. Section 6513 of the Internal Revenue Code, 26 U.S.C. 6513, provides in relevant part:

(a) For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.

(b) For purposes of Sections 6511 and 6512—

(1) Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of

the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

(3) Any tax withheld at the source under chapter 3 shall, in respect of the recipient of the income, be deemed to have been paid by such recipient on the last day prescribed for filing the return under section 6012 for the taxable year (determined without regard to any extension of time for filing) with respect to which such tax is allowable as a credit under section 1462. For this purpose, any exemption granted under section 6012 from the requirement of filing a return shall be disregarded.

* * * * *

(d) If any overpayment of income tax is, in accordance with section 6402(b), claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year (whether or not claimed as a credit in the return of estimated tax for such succeeding taxable year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year in which the overpayment arises.

* * * * *

7. 26 C.F.R. 301.6402-3 provides in relevant part:

(a) In the case of a claim for credit or refund filed after June 30, 1976—

* * * * *

(5) A properly executed individual, fiduciary, or corporation original income tax return or an amended return (on 1040X or 1120X if applicable) shall constitute a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return (or amended return). For purposes of section 6511, such claim shall be considered as filed on the date on which such return (or amended return) is considered as filed, except that if the requirements of §301.7502-1, relating to timely mailing treated as timely filing are met, the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return (or amended return) was mailed. A return or amended return shall constitute a claim for refund or credit if it contains a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return (or amended return) is filed. If the taxpayer indicates on its return (or amended return) that all or part of the overpayment shown by its return (or amended return) is to be applied to its estimated income tax for its succeeding taxable year, such indication shall constitute an election to so apply such overpayment, and no interest shall be allowed on such portion of the overpayment credited and such amount

shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.

* * * * *

Supreme Court, U.S.
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No. 98-1667

IN THE
Supreme Court of the United States

DAVID H. BARAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a remittance of estimated taxes or of taxes withheld from wages is a payment of tax that is subject to the limitation on credits or refunds set forth in section 6511(b) of the Internal Revenue Code. 26 U.S.C. § 6511(b).

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Judgment and Memorandum of the Court of Appeals for the District of Columbia Circuit is set forth in the Appendix hereto at App. 1-4. The Memorandum and Order of the United States District Court for the District of Columbia is set forth in the Appendix hereto at App. 5-10. Neither decision is officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1999. The petition for a writ of certiorari was filed on April 13, 1999, and was granted on September 28, 1999. Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Sections 6315, 6511(a) and (b)(2)(A) and 6513 (b)(1) and (2) of 26 United States Code (the Internal Revenue Code of 1986)[1] and 26 Code of Federal Regulations sections 301.6315-1 and 301.6402-3(a)(1) are reproduced in the Appendix hereto at App. 11-13.

STATEMENT OF THE CASE

A. *Statement of Facts*

In the calendar year 1988, petitioner was employed, as he had been for many years, in the mailroom of *The Washington Post*. He had, before employment with *The Washington Post*, retired from service with the United States Government, and he received in 1988 a pension based on that Government service. He also had dividend income and capital gains in 1988. *See* Dep. of David Baral, Cir. J.A. 52-53; Income Tax Return of David Baral, Cir. J.A. 21.[2]

Petitioner prepared his own tax returns without professional aid or advice. He relied essentially on Internal Revenue Service ("IRS") instructions for the preparation of returns. Withholding on petitioner's wages by *The Washington Post*, transmitted to the IRS by the *Post*, amounted to $4,104. Toward the end of 1988, petitioner became concerned that the withholding might be inadequate to meet his income tax obligation (yet to be computed and determined) for the year. He concluded that, to avoid possible penalties and interest, he should remit additional funds to the IRS. Accordingly, in January

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[1] Hereinafter, 26 U.S.C. will be referred to as the "Code."

[2] "Cir. J.A." refers to the Joint Appendix filed in the Court of Appeals for the D.C. Circuit and made a part of the record before this Court.

1989 he remitted $1,100 with an IRS Form 1040-ES (Estimated Tax Form). *See* Dep. of David Baral, Cir. J.A. 65-68; Form 1040-ES, Cir. J.A. 20.

On April 15, 1989, petitioner filed an Application for Automatic Extension of Time (IRS Form 4868) to file his 1988 income tax return, without making any additional remittance to the IRS. The filing of this Form extended the time to file his 1988 income tax return to August 15, 1989. *See* Dep. of David Baral, Cir. J.A. 56-57.

Petitioner was unable to find a copy of his 1987 federal income tax return or copies of IRS Forms 1099 (Information Returns) for 1988. He knew that he had a substantial capital loss carryover from 1987. He also knew that he had substantial capital gains and dividend income in 1988. It was necessary, in order to prepare a correct 1988 return, to determine the amount of investment income and capital gains realized and the amount of the capital loss carryover. Therefore, he went to the Washington Area Office of the Internal Revenue Service and requested assistance and information for resolving the problem. *See* Dep. of David Baral, Cir. J.A. 59-61.

Petitioner did not receive the assistance or information sought. He therefore could not complete a proper return on time. He believed, however, that the amounts withheld and estimate remitted would fully cover his income tax liability when that liability could be determined. *See* Dep. of David Baral, Cir. J.A. 64.

Sometime in early 1993 he received a letter from the IRS stating that the IRS had no record of receiving his 1988 income tax return. He responded by reiterating his need for a copy of his 1987 income tax return and the 1988 data on Forms 1099, stating why the materials sought were necessary in order to prepare his 1988 return.

This time the IRS provided copies of the 1987 return and the 1988 data. *See* Dep. of David Baral, Cir. J.A. 59-60; Mem. and Order, App. 6.

Promptly thereafter, on June 1, 1993, he filed his 1988 return. His tax as determined on the return was $4,029. Withholding taxes and the estimated tax payment amounted to $5,204. The return therefore showed, and petitioner claimed on the return, an overpayment of tax in the amount of $1,175. *See* Income Tax Return for 1988, Cir. J.A. 21-26. The return was audited by the IRS and determined to be correct sometime in the period between June 1, 1993 and December 6, 1993. The IRS, however, rejected petitioner's claim on the ground that petitioner was deemed to have made his overpayment of income tax on April 15, 1989, a date more than three years and four months (the extension period) before the claim was filed by the return on June 1, 1993. In the IRS view, Baral's claim was time-barred under Code section 6511(b).

IRS records of petitioner's tax account for 1988 show, until the assessment of the income tax on July 19, 1993, "credits" for withheld taxes and the estimate of tax payment. Only upon assessment were the credits applied to the income tax. *See* IRS Record of David Baral Account, Cir. J.A. 27; Certificate of Assessments and Payments, Cir. J.A. 28-29.

B. *Proceedings Below*

The district court below (Lamberth, J.) granted the Government's motion for summary judgment, holding that that court lacked jurisdiction because petitioner's claim, set forth in his 1988 tax return filed June 1, 1993, for overpayment of tax was barred by the statute of limitations stated in Code section 6511(b)(2)(A). The court dismissed the complaint with prejudice. *See* Mem. and

Order, App. 10. The district court based its decision on "statutory language" (Code section 6513(b)(1)) which, as construed by the court, required withholding to be treated as payment of income tax on the return due date, April 15, 1989, and on "relevant case law" which caused the "estimated remittance" to be treated as payment of income tax on the return due date. The court also accepted that the Government had "definitively" distinguished the case of *Rosenman v. United States*, 323 U.S. 658 (1945), which otherwise would lead to a contrary result and decision. The district court held that the *Rosenman* decision applied only to an "arrangement" between the taxpayer and the IRS pursuant to which remittances were held as "a deposit made in the nature of a cash bond," 323 U.S. at 662, and the court found that no such arrangement existed in the *Baral* case. Mem. and Order, App. 8-9.

Upon review, the court of appeals affirmed *per curiam*, holding (1) that the payments of withholding and estimated tax when deemed made were payments of income tax "as a matter of law," and (2) that the Supreme Court case of *Rosenman v. United States*, 323 U.S. 658 (1945), was irrelevant. App. 3-4.

SUMMARY OF THE ARGUMENT

Under Code limitations provisions, a taxpayer seeking credit or refund of an overpayment of tax for which the taxpayer is required to file a return must file his claim within three years from the time the return is filed. Code § 6511(a). Here the claim for overpayment of 1988 income tax was filed in and with the income tax return itself; therefore the claim was timely and the Government does not, as far as we know, dispute its timeliness. However, the limitations statute also provides that the credit or refund shall not exceed the amount of taxes paid

within three years (plus the period of any extension of time granted for filing the return) immediately before the filing of the claim. Code § 6511(b)(2)(A). The starting point for measuring this limitation is therefore payment of the tax which is subject to the claim for credit or refund, however late that payment may be made.

Here, Mr. Baral filed his return late, beyond the extension of time he was granted. The question before the Court is when did he pay his income tax for 1988?

Petitioner Baral maintains that payment of the income tax occurred only after he filed his return for 1988 on June 1, 1993, and the income tax was then first ascertained and known to the parties. Payment was made when the tax was assessed on July 19, 1993. At that time, outstanding credits for withheld and estimated taxes were applied by the IRS to the income tax due, in accordance with applicable provisions of the Code and Treasury Regulations. *See* Baral Account Statement, Cir. J.A. 27; Certificate of Assessments and Payments, Cir. J.A. 28-29.

Long ago, in the case of *Rosenman v. United States*, 323 U.S. 658 (1945), a refund suit for overpayment of estate tax, this Court held that the executors who remitted an estimate of the tax under protest before a return was filed could not have paid the tax at that time. This Court concluded that by remittance of the estimated estate tax, the "taxpayer did not discharge what he deemed a liability nor pay one that was asserted. . . . The tax obligation did not become defined until April 1938 [at assessment]." 323 U.S. at 662. The tax was paid only when the amount due was defined and assessed. The funds originally transmitted were, the Court declared, essentially "a deposit made in the nature of a cash bond." [3] *Id.*

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[3] *See infra*, 16-17, for a detailed review of the *Rosenman* case.

In the *Rosenman* case, this Court particularly stressed the need for consistency between the Code limitations provisions and the Code interest provisions. *See* 323 U.S. at 662-63. "If it is not payment in order to relieve the Government from paying interest on a subsequently determined excess, it cannot be payment to bar suit by the taxpayer for its illegal retention. It will not do to treat the same transaction as payment and not as payment, whichever favors the Government." *Id.* at 663. The conclusion of the court below disregards this part of the reasoning of the *Rosenman* decision. April 15, 1989 was the date of payment for limitation purposes according to the court below, but interest would not begin to accrue in favor of this taxpayer until 1993. *See* Code § 6611.

Some courts of appeals, including the court below, have attempted to nullify the *Rosenman* decision altogether on the ground that it has been superseded by statute, referring to Code section 6513(b)(1) and (2). However, this conclusion is based on a misconstruction of the section, which deems the payments of withheld and estimated tax actually made during the taxable year to occur on the income tax return due date in the following year. This section does not purport to convert withheld and estimated taxes into payment of income tax on the return due date. The amount of income tax becomes defined only when a return is filed; application of withheld taxes and estimates to the income tax occurs on the return. Nevertheless the courts in question simply assume that the withholding taxes on employers and taxpayers' estimates of income tax to be determined in the future are one and the same thing as the income tax. This is error which ignores the structure of the Code and the very significant differences in the incidents and characteristics of withheld taxes and estimates of tax when compared to the income tax. Withheld taxes and estimates simply con-

stitute credits against the income tax, "to be applied" as payments of income tax when the tax is determined on the income tax return and assessed. *See* 26 C.F.R. § 301.6315-1; 26 C.F.R. § 301.6402-3(a)(1).

Central to petitioner's argument is the fact that the claim here is for overpayment of *income* tax, not a claim for overpayment of withheld or estimated taxes. Neither withholding tax nor estimated tax provisions require this taxpayer to file a return. *See* Code § 6511(a) (for requirement of a return by the claimant for limitations purposes).[4]

Under the Internal Revenue Code, withholding taxes are a part of "Employment Taxes." Subtitle C, Chapter 24. They are imposed on employers based on the wages of employees, and they are required to be remitted by employers, who may be subject to special penalties. The determination of amounts to be withheld bears no resemblance to the method for determining income tax due. Indeed approximately 70% of wage earners recover overpayments of income tax in due course. Internal Revenue Service Statistics of Income, *Individual Income Tax Returns 1995*, at 2, 4, 5, 7 (1997). The withheld taxes give rise to employee credits against future income tax. Code § 31.

Estimates of income tax are just that: informed guesses, generally based on past experience modified by unusual current experience, about income taxes to be ascertained later. They also give rise to credits against income tax to be applied when the income tax due is determined. As the Code states, unpaid estimates of tax cannot be as-

[4] The *employer* is required to file withholding tax returns. No Code section imposes an estimate of tax requirement or requirement of a return therefor. *See infra*, 20.

sessed. Code § 6201(b)(1). A failure properly to pay sufficient estimates, measured by the income tax as later determined, may result in special penalties. While remittance of withholding taxes and estimated taxes results in accelerating the collection of revenue by the U.S. Treasury, neither constitutes the payment of income tax, which is imposed and determined under Subtitle A, Chapter 1, of the Code.

When the attributes specified by the Code are examined, it seems plain that *by statute* withholding taxes and estimated taxes are effectively deposits "made in the nature of a cash bond." *Rosenman v. United States*, 323 U.S. at 662. They could not constitute the payment of income tax on April 15, 1989, because no one knew the amount of the income tax by that date. They remained credits at least until the income tax was determined on Mr. Baral's tax return filed June 1, 1993, and they were treated simply as credits by the IRS until assessment. Payment of the income tax therefore occurred at the earliest on June 1, 1993, when the amount of that tax first became known, and more precisely on July 19, 1993, when the income tax was assessed. The claim of the taxpayer was timely in all respects since the payment of the income tax, a part of which was claimed as overpayment, occurred at the time of the claim.

Three basic grounds support the petitioner's position. First, as this Court declared in the *Rosenman* case, a tax liability cannot be paid until it is defined, known, and fixed by assessment. Second, the construction of section 6513(b)(1) and (2) by the court below does not square with the language of the section; any construction of the section beyond its strict language ought not violate the rule of reason of the *Rosenman* case. Finally, the limitations provisions of the Code are not aimed at late filing of returns and late payments; other provisions of the Code

deal with those matters. The starting point for limitations is the payment of the tax claimed to be overpaid, whenever that payment occurs and however late. Credits to be applied against a tax to be determined in the future do not, before they are so applied, constitute payment of that tax.

ARGUMENT

Both the United States and the petitioner have agreed that the application of the Code limitations provisions has been seriously inconsistent in the courts of appeals, and that those courts have treated the *Rosenman* decision in varying ways.[5] We will not review those decisions at any length here. In the petitioner's view, the question before this Court is to be resolved by analysis of the Code and Regulations provisions, with due regard for the precedent of this Court's *Rosenman* decision and the opinion there of Justice Frankfurter, read as it was written without the eroding glosses of subordinate court judges.

I. CODE SECTION 6513(b)(1) AND (2) HAS BEEN MISCONSTRUED BY THE COURT BELOW; THE DEEMED PAYMENT DATE FOR WITHHELD TAXES AND ESTIMATES IS NOT THE DATE OF PAYMENT OF THE INCOME TAX

A. A Plain Reading of Section 6513(b)(1) and (2) Shows That the Deemed Date of Payment Thereunder is the Deemed Date of Payment of Withholding Taxes and Estimates of Tax, Not the Income Tax.

The court below in this case has held that section 6513(b)(1) and (2) disposes of this case by making the

[5] Petitioner identified three lines of decisions in the courts of appeals in his petition to this Court. *See* Baral Pet. for Writ of Cert., 7-9. The Government apparently agrees. *See* Br. for the United States (on the Petition), 4-5, 9-14.

income tax return due date the date of payment of the income tax. This conclusion has no support, however, in the text of the section. Subsection (b)(1) of section 6513 reads as follows:

> Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

The tax deemed paid in the subsection is the "tax actually deducted and withheld at the source," that is, the *withholding* tax, not the income tax. Thus, withholding tax payments made at intervals during the taxable year are brought forward to the income tax return due date in the following year.[6] The subsection does not purport to convert withholding taxes into income tax on the return due date. That is done on the income tax return. *See* 26 C.F.R. §§ 301.6315-1, 301.6402-3(a)(1).

In the case of estimated taxes, subsection (b)(2) of section 6513 is equally explicit:

> Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under

[6] The section seems designed to benefit taxpayers in the following type of situation: a taxpayer files his return on the due date and the tax is paid by applying withholding taxes that had been paid throughout the year to the income tax due as shown by the return. Almost three years after the return date, the taxpayer files a claim for refund based, for example, on his discovery of additional substantial deductions for the year in question. The claim is timely in all respects. Any contention that the refund is barred because withholding and estimates paid the income tax when withholding taxes and estimates were actually collected is rejected by this section.

section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

The tax dealt with here is an "amount paid as *estimated* income tax." Code § 6513(b)(2) (emphasis added). The installments of estimated tax, paid during the taxable year, are combined and deemed paid on the return due date in the following year. The subsection does not provide that the cumulative estimates of tax are converted into income tax where no return is filed on the due date. That metamorphosis is impossible; the income tax remains undetermined and unknown without a return. *See Rosenman v. United States*, 323 U.S. 658 (1945); *see also* 26 C.F.R. §§ 301.6315-1, 301.6402-3(a)(1) (which specify that credits shall be applied, and overpayments shall be claimed, on the income tax return).

In the case of *United States v. Habig*, 390 U.S. 222 (1968), construing Code section 6513(a), this Court refused to shorten a limitations period by measuring from the date that the return was due instead of from a later date of actual filing of the return. The criminal offense subject to the statute of limitations in that case was alleged to have been committed by a false return. This Court declined to accept the "surprising" contention "that Congress intended the limitations period to begin to run before appellees committed the acts upon which the crimes were based." 390 U.S. at 224-25. Similarly, in *Rosenman* this Court refused to accept the surprising contention that a tax could be paid before the amount of it was determined and assessed. We believe that the *Rosenman* and *Habig* decisions, applications of a principle of logical impossibility,[7] are controlling against the construction urged by the Government.

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[7] *See also Greene v. United States*, 1999 WL 624268, 84 A.F.T.R. 2d ¶ 99-5619 (Fed. Cir. Aug. 16, 1999). In *Greene*, the court rejected a contention that a first tax return started the running of the statute of limitations where that return could not reflect facts which occurred later and which were crucial to the claim for refund; instead the court treated an amended return filed six years after the original return as the return for Code section 6511(a) purposes, and held the claim to have been timely.

What these subsections do is synchronize the payment of withholding tax and estimated tax with the defined income tax liability shown on returns actually filed on the due date by some 98% of all individual taxpayers. Internal Revenue Service Statistics of Income, *Individual Income Tax Returns 1995*, at 5, 7 (1997). They thereby permit the discharge of income tax liability *pro tanto* when that liability is reflected in the return. As the IRS Certificate of Assessments and Payments in this case confirms, when no return is filed on the due date, credits remain outstanding, income tax liability is *not* discharged until assessment, and assessment is not made until the time that the income tax return is actually filed. Cir. J.A. 28-29.

Otherwise the Government's proposed statutory construction, endorsed by the court below, produces very strange results, contrary to good sense. On that construction there was an overpayment of income tax in Mr. Baral's case on April 15, 1989. Of course nobody, including Mr. Baral and the IRS, knew the amount of his income tax or the amount of overpayment on that date. He needed data from the IRS, which came much later, to compute the income tax and to prepare his return. Nevertheless, the Government suggests, he should in some fashion have filed a claim for refund of the unknown overpayment. This would be an invalid claim because *Flora v. United States*, 362 U.S. 145 (1960), requires that the tax liability (unknown on the return due date) be fully paid as a prerequisite to recovery of an overpayment. We note again that under the Treasury Regulations

"in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made *on the appropriate income tax return.*" 26 C.F.R. § 301.6402-3(a)(1) (emphasis added).

If payment of income tax was made on April 15, 1989, the IRS could have then assessed such payment. *See* Code § 6213(b)(4). Why did it not? The answer is obvious: the IRS could not and did not assess an amount as income tax when neither the IRS nor anyone else knew the amount of the income tax; the IRS could only, as it did, post credits reflecting the receipt of withholding and estimated taxes.

The analysis which we have presented receives direct support in some federal courts. *See, e.g., Plankinton v. United States*, 267 F.2d 278 (7th Cir. 1959); *Schmidt v. Commissioner*, 272 F.2d 423, 428-29 (9th Cir. 1959); *Trevelyan v. United States*, 219 F. Supp. 716 (D. Conn. 1963). On the other hand, while we have set forth our reasons for rejecting the Government's statutory construction, some courts have followed that construction. *See, e.g., Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), *cert. denied*, 510 U.S. 1050 (1994); *Ehle v. United States*, 720 F.2d 1096 (9th Cir. 1983); *Binder v. United States*, 590 F.2d 68 (3d Cir. 1978).

The *Oropallo* case, a withholding tax case, involved a *per curiam* circuit court decision where, in a late-filed return, the taxpayer claimed a refund. The court rejected the refund claim as barred by the statute of limitations. However, an issue of equitable tolling of the statute of limitations was the primary focus of the decision. The basic limitations question present in the *Baral* and *Oropallo* cases was summarily disposed of in *Oropallo* in a footnote, which cited an Illinois district court case to the effect that taxpayers were barred under Code section

6513(b)(1) because they filed their returns late. *See* 994 F.2d at 27 n.1.

The *Ehle* case, also a withholding tax case, sets up the usual alternatives of either "payment" or "deposit." The terms of this shorthand dichotomy, "payment" or "deposit," are somewhat inappropriate for the *Baral* case. "Payment" of *what* tax obligation is the question, since both the withholding tax provisions and the estimate provisions constitute Governmental exactions. Were the payments withholding taxes, or did withholding taxes become converted into income tax under Code section 6513(b)(1)? The *Ehle* court blithely assumes that the basic principle of the *Rosenman* case has been superseded by "the clear language of section 6513(b)(1)." 720 F.2d at 1097. But the "clear language" of the section does not purport to change the deemed date of payment of withholding taxes into the date of payment of income tax.

In the *Binder* case, involving withholding and estimated taxes, the taxpayer made the argument that withholding and estimated taxes were "payments made in escrow." 590 F.2d at 69. The court found nothing to indicate an escrow arrangement. That court also, by citation but without much analysis, invoked section 6513(b) to hold for the Government. One judge dissented from the decision upon the ground that this Court's *Rosenman* decision made it clear that payment of the income tax did not take place on the deemed date of section 6513(b).

The notion that section 6513 starts the statute of limitations running on the tax return due date in a case where the return has not been filed by that date and the amount of income tax is unknown is directly contrary to the opinion in *Rosenman v. United States*, 323 U.S. 658 (1945), which sets forth the applicable rule of reason. As this Court declared in the *Rosenman* case, by estimated remit-

tance of the estate tax, the "taxpayer did not discharge what he deemed a liability nor pay one that was asserted. . . . The tax obligation did not become defined until April 1938 [at assessment]." 323 U.S. at 662.

B. The History of the Pertinent Statutory Provisions Does Not Support the Construction Endorsed by the Court Below.

Petitioner Baral maintains that the history of the pertinent Code provisions provides no support for the statutory construction by the court below.

Before 1939 the internal revenue laws of the United States were stated in Revenue Acts, re-enacted with changes and revisions at two-year or three-year intervals ordinarily. In 1939 these laws were codified in more permanent form in the Internal Revenue Code of 1939.

In 1942, the 1939 Code was amended by adding a new section 466 which required withholding taxes on wages. Revenue Act of 1942, Pub. L. No. 77-753, § 172(a), 56 Stat. 798, 888-91 (1943). A new subsection (e) of 1939 Code section 322, added at the same time, deemed such taxes to be paid on the due date for filing the income tax return, then March 15 of the following year. Revenue Act of 1942, Pub. L. No. 77-753, § 172(e), 56 Stat. 798, 893 (1943). In 1943 a further Code amendment was made requiring payments of estimated taxes, and declaring *presumptively* that both estimated taxes and withholding taxes were deemed to be paid "not earlier than" the income tax return due date. Current Tax Payment Act of 1943, Pub. L. No. 78-68, § 4(b), 57 Stat. 126, 140 (1944).

Two years later, in 1945, this Court decided the case of *Rosenman v. United States*, 323 U.S. 658. In that case the taxpayers, executors of a decedent's estate, paid an amount of $120,000 "on account of the Federal Estate

tax" on or about the due date for the estate tax return, December 25, 1934, in order to avoid penalties and interest, stating that the amount was paid under "protest and duress." *Id.* at 660. Two months later, on February 25, 1935, the executors filed the estate tax return. Shortly thereafter, on March 28, 1935, the Collector of Internal Revenue assessed and applied a part of the remittance, $80,224.24, to the estate tax. Three years later, on March 26, 1938, the executors filed a claim for refund of the difference between remittance and assessment as an overpayment. The claim was filed three years and three months after the taxpayers' remittance. Relying on the 1939 Code provision, section 910, which barred recovery of overpayments made more than three years before the filing of the claim for refund, the IRS denied the claim for refund.

On audit in the three years following the filing of the return, the IRS determined a deficiency of estate tax of $10,497.34 and on April 22, 1938 collected additional monies. More than five years after the original payment by taxpayers, but some two years after assessment on audit, May 20, 1940, the executors filed a second claim for refund of part of their initial remittance plus the additional payment. This was denied for the original remittance as time-barred, and the IRS was upheld by the Court of Claims.

This Court unanimously reversed the Court of Claims, holding that, until assessment of the tax, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. . . . The tax obligation did not become defined until April 1938 [at assessment]." 323 U.S. at 662.

When the Internal Revenue Code of 1954 was enacted, section 322(e) of the 1939 Code became secton 6513(b)

of the 1954 Code. Although there is no indication that any substantive change was intended,[8] the draftsmen of the 1954 Code substituted a flat income tax return filing date for deemed payment of withholding taxes and estimated taxes, instead of using the phrase "not earlier than." They also provided that the income tax return due date for this purpose, April 15 of the following year for a calendar year taxpayer, did not change because of an extension of time to file. Notably, there was no effort to change or overrule by legislation the basic holding in the *Rosenman* case. There is no reference to that case or its rationale in the legislative history.

In 1966, Code section 6513(b) was divided into two subparagraphs, (b)(1) and (b)(2), and a new (b)(3) was added which has no application here. *See* Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, § 105 (f)(1), 80 Stat. 1539, 1567-68 (1967).

The history of these statutes is significant in the following respects:

1. There was no attempt to supersede or legislatively overrule the *Rosenman* case.

2. There was no intention to eliminate the "presumptive" character of section 6513's deemed return due date or the "not earlier than" application of the deemed date.

3. Section 6513 deals with the *timing* of payments of *withholding* and *estimated* taxes only. It does not under-

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[8] The Senate Report accompanying the 1954 Code stated that section 6513(b) "corresponds to existing law in that the *presumptive* date of payment is the due date of the corporation or individual income tax return." S. Rep. No. 83-1622, at 587 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 5236 (emphasis added); *see also* H.R. Rep. No. 83-1337, at A416 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4563 (implying that the only change was to move the presumptive date of payment from March 15 (pre-1954) to April 15).

take to change the tax character of the payments, *i.e.*, it does not convert payments of withholding tax or estimated tax into payments of income tax in a case where a return is not filed on the income tax return due date and the income tax is uncomputed and unknown on that date.

C. The Structure and Provisions of the Code Make It Clear that Withholding Taxes and Estimates of Tax are *Not* the Income Tax.

The design of the Internal Revenue Code evidences that withholding taxes and estimates of tax are separate and distinct from the income tax. The Internal Revenue Code has six Subtitles of which only one, Subtitle A, deals with income tax, although Subtitle F, dealing with Procedure and Administration, may be applicable to any tax under the Code, *e.g.*, the income tax or estate tax or excise taxes. Within Subtitle A, only Chapter 1 sets out the complicated and intricate rules for determining taxable income and the income tax, from definition of gross income to exclusions from gross income, from adjusted gross income to deductions and to taxable income, with special provisions for capital gains, mergers and acquisitions, pension and profit sharing plans, oil and other mineral interests, and rules for a host of other situations and transactions. Nothing in Chapter 1, except section 31(a) providing a credit for withheld tax, has to do with withholding taxes or estimated taxes.

Withholding taxes are governed by the provisions of Subtitle C, concerned with "Employment Taxes," and are dealt with in Chapter 24 thereof. The withholding tax sections impose an obligation on *employers* to withhold from compensation paid to employees and to pay to the IRS a percentage of wages determined primarily by the amount of wages and the number of dependents claimed by the employee. The withholding tax provisions also recognize special exemptions. Finally the Code imposes

unique penalties on employers for failure to collect and pay over withholding "trust fund" amounts. *See, e.g.*, Code § 6672 (imposing a 100% penalty). The penalties imposed for (civil) non-compliance with income tax law are quite different. *See, e.g.*, Code §§ 6651 and 6662.

Estimated taxes are governed by the rules of Subtitle F ("Procedure and Administration") and more particularly sections 6654 and 6655 of Subchapter A of Chapter 68 dealing with "Additions to the Tax and Additional Amounts." Section 58 of the Internal Revenue Code of 1939 and section 6015 of the Internal Revenue Code of 1954 required declarations of estimated tax by individual taxpayers. These sections defined "estimated" tax as an estimate by the individual of the amount of income tax under Chapter 1, less an estimate of credits under Chapter 1. In 1984 some Code draftsman, apparently in the interest of tax simplification, decided that section 6015 of the 1954 Code could be eliminated, and this was done. *See* Tax Reform Act of 1984, Pub. L. No. 98-369, § 412(a)(1), 98 Stat. 494, 792 (1986). As a result, the present Code has no provision which imposes an estimate of tax requirement, but it does have *penalty* provisions for failing to pay, or for underpaying, an estimated tax. *See* Code § 6654.

The estimated tax penalty provisions, which specify various methods of estimating by which penalties may be avoided, are different and separate from income tax penalties. Interestingly, section 6654(f) itself distinguishes estimated tax from income tax by providing a definition of the term "tax" used in section 6654 as the tax determined under Chapter 1 (normal income tax) and Chapter 2 (self-employment tax), not to be confused with the "estimated tax."

Apparently, like a cash bond, estimated tax can only be "posted" as a credit. *Cf.* Rev. Proc. 84-58 § 3.05,

1984-2 C.B. 501, 502; Rev. Proc. 63-11 § 4, 1963-1 C.B. 497, 498 (an advance payment not assessed is treated as a cash bond). This was the procedure followed by the IRS in the *Baral* case, that is, posting of credits until the return was filed and an assessment of income tax was entered, *at which time* the estimated tax was applied to discharge the income tax liability. *See* Certificate of Assessments, Cir. J.A. 28-29.

Code section 6315 provides that estimated tax payments are made "on account of" income tax.[9] The Treasury Regulation interpreting this provision states that "[t]he aggregate amount of the payments of estimated tax should be entered *upon the income tax return for such taxable year as payments to be applied against the tax shown on such return.*" 26 C.F.R. § 301.6315-1 (emphasis added).

In summary, withholding taxes and estimated taxes are tax regimes in their own right. While they were created to supplement the income tax, they are governed by their own unique rules and penalties. To treat them as component parts of the income tax, set out in Chapter 1 of the Code, is an error. Both withholding taxes and estimates of tax differ from income tax in the following significant ways:

1. Amounts paid as withholding taxes and estimates give rise to credits only, to be applied in the future against the income tax when the income tax is defined.

2. Neither withholding taxes nor estimated taxes can be recovered by refund except as income tax

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[9] This is exactly the language, "on account of" [the estate tax], used to describe the initial remittance made by the executors in the *Rosenman* case, determined by this Court to be in the nature of a cash bond. 323 U.S. at 660.

refunds upon a claim made in a return once the income tax is determined, assessed and paid.

3. No interest is payable on withholding or estimated taxes.

4. Neither withholding taxes nor estimated taxes owing can be assessed against the persons credited with these taxes.

Credits before a tax obligation is defined are clearly not a payment of that obligation. Under the Internal Revenue Code, there are forty different credits available against the income tax, ranging, *e.g.*, from foreign tax credits (sections 27 and 901), child tax credits and child care credits (sections 21 and 24), gasoline tax credits to specified tax payers (section 34), and energy credits (section 48(a)), to empowerment zone credits (section 1396). Obviously these credits do not constitute a payment of income tax when they arise. The credits become payments of income tax only when they are applied on the taxpayer's return to the income tax.

Withholding tax obligations are imposed on employers, not employees. Withheld taxes as such cannot be claimed as refunds by employee-taxpayers. The overpayment of income tax by credits for withheld taxes cannot be determined for employee-taxpayers until the amount of the income tax is known. Similarly, no refunds can be claimed on estimates of tax of taxpayers. Until the income tax is defined, there is no way to ascertain overpayments of the estimates.

Withholding taxes cannot be assessed against employee-taxpayers since those taxpayers have no obligation to report or pay those taxes. Unpaid estimates cannot be assessed against the estimating taxpayers because the Code prohibits such assessments (section 6201(b)(1))

and the prohibition is compelled by the logic of the estimate provisions in any event since estimates are simply judgment calls and remittances designed to avoid penalties.

The Government has in its submissions to the courts heretofore in this case attempted to belittle the significance of assessment, suggesting that it is merely a bookkeeping entry. More accurately, we believe, assessments fix tax liabilities and establish obligations thereafter collectible by the Government. *Rosenman v. United States*, 323 U.S. 658 (1945); *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 1559 (1998) (remittance in settlement was a deposit, not payment of income tax, and a failure of the IRS timely to assess resulted in an illegal Government holding of the remittance).

The significance of assessment as the definitive act establishing tax liability is emphasized in Chapter 63 ("Assessment") under Subtitle F of the Code. Thus, a basic effect of jurisdiction by the Tax Court of the United States is to suspend assessment and collection of tax or levy until the decision of the tax court becomes final. *See* Code § 6213(a). It is pertinent to this case and important that withholding taxes and estimates owing cannot be assessed against employee-taxpayers or estimating taxpayers, although any "amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment . . . ." Code § 6213(b)(4). Clearly withholding taxes and estimates when "deemed paid" are not payments of the income tax.

II. THE *ROSENMAN* DECISION OF THIS COURT HOLDS THAT REMITTANCES MADE BEFORE A TAX IS DETERMINED AND ASSESSED ARE DEPOSITS, NOT PAYMENTS OF THE TAX

In the Brief for the United States on the Petition for a Writ of Certiorari here, the Solicitor General attempts at some length to distinguish the *Rosenman* case from the *Baral* case by emphasizing the use of the word "arrangement" (asserted to be "consensual") between the taxpayer and IRS in *Rosenman*. However, the Baral facts indicate an "arrangement" of exactly the same limited kind as that of the *Rosenman* case. Under the Code provisions for estimates of tax, Mr. Baral forwarded his estimated payment only to avoid penalties and interest which the Code imposes. The Government received the remittance and placed a credit in Baral's account without more. The same consensus took place as in *Rosenman*.[10]

In view of this supposed built-in limitation on the *Rosenman* opinion and decision urged by the Government and endorsed by the court in this case, the following excerpt from the opinion in *Rosenman* which presents the basic rationale for the decision is worth quoting verbatim:

> The action here complained of was the assessment of a deficiency by the Commissioner in April 1938. Before that time there were no taxes "erroneously or illegally assessed or collected" for the collection of which petitioners could have filed a claim for refund. The amount then demanded as a deficiency by the Commissioner was, so the petitioners claimed, erroneously assessed. It is this erroneous assessment that gave rise to a claim for refund. Not until then was there such a claim as could start the time running for presenting the claim. In any responsible sense payment was then made by the application of the balance credited to the petitioners in the suspense account and by the additional payment of $10,497.34 on April 22, 1938. Both these events occurred within three years of May 20, 1940, when the petitioners' present claim was filed.

323 U.S. at 661-62.

As the facts recited elsewhere in the opinion show, the "arrangement" consisted only of the taxpayers' remittance of an estimated payment under protest before a return was filed. The Government's role in the "arrangement" was to receive the funds and credit them in a suspense account. Furthermore, in arguing to the courts, the Government contended that it had gotten payment of the estate tax in that first remittance; this is hardly evidence of any understanding between the parties that the payment was a deposit. It is particularly noteworthy that the "arrangement" was arrived at apparently without consultation or further communication between the parties beyond the transmittal letter for the remittance.

The real effect of the supposed "distinction" offered by the Government and accepted by the courts below is simply to draw attention away from the fundamental analysis and rationale of the *Rosenman* decision: payment of a tax occurs only when the amount of the tax is defined and assessed.

We have in the analysis of Code section 6513(b) above demonstrated, we believe, why that section does not undermine the validity of the *Rosenman* opinion and decision.

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[10] The taxpayer had nothing to do with withholding taxes, paid by the employer, credited by statute to the taxpayer as employee, and held in suspense as a credit in his account. That employment tax collected from the employer could not be the subject of an "arrangement" between the taxpayer and the Government. Nevertheless, its status is determined *by statute* as a credit, not as a payment of income tax.

The importance of this Court's analysis in the *Rosenman* case is that section 6513(b) sets a deemed time of payment for withholding taxes and estimates of tax; the *Rosenman* decision makes it clear that those taxes can only become payments of the income tax when a filed income tax return defines the amount of income tax and the credits are applied to that amount at assessment. The Code and Regulations confirm this position, and that is what the IRS followed as correct procedure in the *Baral* case. Certificate of Assessments and Payments, Cir. J.A. 28-29. Payment of the income tax was made on July 19, 1993, and the claim of overpayment was timely under the Code limitations period under section 6511(b) as well as section 6511(a).

III. THE LATE FILING OF THE RETURN DOES NOT SUPPORT THE GOVERNMENT POSITION

The Government has heretofore stressed the taxpayer's failure to file his income tax return on time as some support for its limitations position. However, the limitations provisions do not cut off claims for overpayments simply because a return is filed late. There is no such penalty; late filing and late payment are addressed as penalty matters elsewhere (section 6651) in the Code and the forfeiture of refunds and credits is not one of the penalties.

The starting point for possible limitation on recovery of an income tax overpayment is the payment of the income tax, whenever that occurs and however late. Thus, if a taxpayer was not subject to withholding, paid no estimates, and filed his income tax return ten or even twenty years late, making payment of the tax with the return, he would still have three years within which to claim a credit or refund by amended return, and the claim would

unquestionably withstand attack under the statute of limitations.[11]

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that the decision of the court of appeals below be reversed.

Respectfully submitted,

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November 12, 1999

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[11] In the present case, Baral could not prepare a proper return until he got the information requested from the Government. Were this a case of assertion of ordinary civil penalties, he may well have been adjudged to have "reasonable cause" for late filing. *See In the Matter of Sims*, 1991 WL 322994 (Bankr. E.D. La. Dec. 6, 1991).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1998

No. 97-5297
96cv01690

DAVID H. BARAL,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court
for the District of Columbia

Before: EDWARDS, *Chief Judge*, SILBERMAN and SENTELLE, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. *See* D.C. Cir. R. 36(b). On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the accompanying memorandum. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 41(a)(1). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

FOR THE COURT:

Mark J. Langer
Clerk

David H. Baral v. U.S.A., 97-5297

MEMORANDUM

David H. Baral appeals from the judgment of the district court denying his claim for credit of an overpayment of income tax as barred by the applicable statute of limitations. For the tax year, Baral's employer withheld $4,104 in income tax from his wages; Baral also remitted an additional $1,100 in estimated tax. Baral did not file his 1988 return, however, until 1993, at which time he reported an overpayment on his 1988 taxes of $1,175 and requested that that amount be refunded. The IRS denied the claim for a credit on the ground that it was barred by the statute of limitations under 26 U.S.C. § 6511(b)(2)(A) (1994), which limits the amount of credit or refund the taxpayer can receive to the amount of tax "paid" in the three years (plus the period of any extension of time for filing the return; in this case four months) preceding the filing of the claim.

Baral contends that the withheld income tax and the estimated tax remittance were not "payments" so as to fall under the limitations of § 6511(b)(2)(A) but instead were merely "deposits" against potential liability. This argument, however, is foreclosed by the plain language of the statute. Section 6513(b)(1) provides that any amount of tax withheld from wages is "deemed to have been paid" by the recipient of the income on April 15 of the following year. Similarly, § 6513(b)(2) provides that any amount paid as estimated income tax shall be "deemed to have been paid" on April 15 of the following year. That Baral may have intended the remittances to be deposits rather than payments under § 6513 is irrelevant; the statute conclusively determines that these remittances were payments as a matter of law. Baral's

reliance on *Rosenman v. United States,* 323 U.S. 658 (1945) is similarly misplaced. *Rosenman* simply has no relevance to situations, such as the case here, involving a statutorily defined payment. As such, Baral is barred from recovering anything on his claim because his taxes for 1988 had all been paid more than three years and four months before he filed his claim, and the district court correctly granted summary judgment to the government.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 96-1690

DAVID H. BARAL,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM AND ORDER

This matter comes before the court on the defendant's motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56. Upon consideration of the parties' submissions and the relevant law, for the reasons set forth below, the court will grant defendant's motion for summary judgment.

I.

BACKGROUND

During tax year 1988, while employed with the Washington Post, $4,104.00 was withheld from plaintiff Mr. Baral's wage earnings. Dep. at 4, 1.7; 16, 1.3. Without knowing at that time what his exact tax liability was to be for tax year 1988, Mr. Baral sent an estimated payment for an additional $1,100.00 to the Philadelphia Service Center of the Internal Revenue Service ("IRS") along with a Form 1040-ES, in January of 1989. Interrog. at 6; Dep. at 16, 11.6-20 and 22, 11. 10-11. Mr. Baral submitted IRS Form 4868 in April, 1989, and was granted a filing extension until August 15, 1989. Dep. at 8, 11. 12-22 and 9, 11. 1-9. This was the only Form 4868 filed by Mr. Baral for an extension. Dep. at 10, 11. 6-9.

Anticipating a significant 1987 capital loss carryover that would be applied to 1988, Mr. Baral assumed that he would ultimately be in line for a 1988 tax refund. Dep. at 15, 11. 1-9. However, unsure of whether the withholdings were going to be sufficient and without knowledge of the exact capital loss carryover amount, Mr. Baral sent the $1,100 so as to avoid penalties and interest. Dep. at 19, 11. 2-9, and 22, 11. 12-14.

Mr. Baral did not file his 1988 tax return until June, 1993. Dep. at 10, 1. 16. He attributes the untimely filing of the 1988 return to the fact that he had lost or misplaced records necessary to prepare the return. Dep. at 10, 11. 18-22, and 11, 11. 1-20. He did make some attempt to get the information, through a request for a file transfer from the Philadelphia office to the Washington, D.C. office. Dep. at 12, 11. 3-8. That request was not satisfied. *Id.* The necessary information was provided by the IRS in June, 1993. Pl.'s Opp. at 2.

At the time of the June, 1993 tax filing, Mr. Baral sought a credit for $1,175.00, to be applied to his 1989 return. Dep. at 6, 11. 15-21. The IRS denied the claim, noting that statute of limitations had run. Compl. at 2. The instant action is based on Mr. Baral's assertion that this statute of limitations does not apply because his $5,204.00 of remittances were "deposits," not "payments." Compl. at 2.

II.

STANDARDS OF REVIEW

Federal Rule of Civil Procedure

Summary judgment must be granted in favor of the moving party when there is no genuine issue of material fact and the moving party is entitled to such judgment as a matter of law. Fed. R. Civ. Proc. 56. The moving party bears the initial burden of establishing the absence

of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When this burden is met, the non-moving party is then responsible for demonstrating that there is a genuine issue for trial. *Id.*

Statutory Provisions

Commonly known as the Internal Revenue Code, 26 U.S.C. Section 6511 states that the limitations periods established are jurisdictional in nature and cannot be waived. In relevant part, subsection 6511(a) allows claims for credit to be filed within 3 years from time return was filed, or 2 years from time taxes were paid, whichever expires later. 26 U.S.C. Section 6511. In addition, subsection 6511(b)(2)(A) limits the amount of credit such that it will not exceed amounts paid within 3 years preceding that credit claim filing. *Id.*

Internal Revenue Code Section 6513 states that taxes withheld and deducted at the source during any calendar year are considered to have been paid on April 15 of the next year. 26 U.S.C. Section 6513(b)(1). Finally, sections 6072 and 6315 indicate that estimated payments are deemed to be paid on April 15 of the following calendar year.

III.

ANALYSIS

The fundamental issue before this court is whether the remittances made by the plaintiff are to be considered "deposits" or "payments" as they relate to the applicable statute of limitations. The defendant's arguments present a very persuasive basis on which to deem the remittances as payments, based on case law and statutory language. Namely, income tax withholdings and estimated tax payments are "payments" and not "deposits."

The defendant correctly anticipates Mr. Baral's use of *Rosenman,* in which the Supreme Court, considering an arrangement between the taxpayer and the IRS, viewed the remittance for estate taxes as a deposit. *Rosenman v. United States,* 323 U.S. 658, 662 (1945). However, the defendant definitively distinguishes *Rosenman* from the instant case by virtue of there being no agreement of any sort between Mr. Baral and the IRS. Furthermore, the defendant points to the *Rosenman* decision and the line of cases following it as pre-dating the aforementioned relevant subsections of 26 U.S.C. Section 6513. According to those statutory provisions, Congress clearly intended for remittances made by April 15 of a given calendar year—$1,100 in January, 1989—to be considered as taxes paid and applicable to the liability for the preceding taxable year. Mr. Baral, in citing *Rosenman,* cannot even point to any analogous arrangement between himself and the IRS in which he indicated that he wished remittance to be held as cash bond or "deposit."

Mr. Baral also cites *Ameel v. United States,* 426 F.2d 1270 (6th Cir. 1970), quoting the court as follows: "In general, a tax is considered 'paid' for purposes of the running of the periods of limitations when a taxpayer files his return, accompanied by his payment." *Ameel* at 1272. That case involved government assessment of further estate taxes due three years after the original return was filed. A 1965 refund claim based on excessive 1963 government assessment and related to the statute of limitations was the central issue.

At the time the 1963 remittance was paid, to cover a government-computed deficiency, a Treasury Form 1962 was prepared by the IRS agent. *Id.* at 1271. This Advance Payment Record had two purposes. The agent could have instructed government to either (1) cash the check and hold as cash bond against repayment to tax-

payer upon request and if remittance was later found to exceed tax liability; or (2) process the check and assess as payment. *Id.* The agent undertook the latter instruction rather than the arrangement possible under the former. The court therefore held that payment had been made effective February 7, 1963. The February 9, 1965 refund claim was found to be outside the applicable two-year statute of limitations. While not directly on point, *Ameel* is actually applicable to the defense's argument that his remittances are to be considered as payments effective February 7, 1963, due to lack of special arrangement with the government.

IV.

CONCLUSION

There is no genuine issue of material fact present in this case. The remittances made by Mr. Baral are to be considered "payments" for his 1988 tax liability. The statutory language clearly commands that taxes withheld and deducted at the source in any calendar year are to be considered as payment effective April 15 of the next year. The remittances of $4,104.00 withheld by the Washington Post are therefore to be viewed at "payment" effective April 15, 1989.

Relevant case law provides ample authority for viewing the estimated remittance of $1,100.00 as "payment" rather than "deposit." *Rosenman* is distinguished from the instant case by virtue of an arrangement between the taxpayer and the IRS. Likewise, the *Ameel* court affirmed the trial court's holding of the refund claim being outside the two-year limitation window. Again, there is the absence of any arrangement that would arguably change the effective date of payment. The defendant has effectively demonstrated a lack of genuine issue of fact in this case.

Therefore, this court grants the defendant's motion for summary judgment. The complaint herein is hereby DISMISSED WITH PREJUDICE.

SO ORDERED.

ROYCE C. LAMBERTH
United States District Judge

Date: 8/21/97

PERTINENT STATUTES AND REGULATIONS

TITLE 26, UNITED STATES CODE (INTERNAL REVENUE CODE OF 1986)

§ 6315. Payments of estimated income tax.

Payment of the estimated income tax, or any installment thereof, shall be considered payment on account of the income taxes imposed by subtitle A for the taxable year.

§ 6511. Limitations on credit or refund.

(a) Period of limitation on filing claim.—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) Limitation on allowance of credits and refunds.—

(2) Limit on amount of credit or refund.—

(A) Limit where claim filed within 3-year period.—If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of

the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

§ 6513. Time return deemed filed and tax considered paid.

(b) Prepaid income tax.—For purposes of section 6511 or 6512—

(1) Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

TITLE 26, CODE OF FEDERAL REGULATIONS

§ 301.6315-1. Payments of estimated income tax.

The payment of any installment of the estimated income tax (see sections 6015 and 6016) shall be considered payment on account of the income tax for the taxable year for which the estimate is made. The aggregate amount of the payments of estimated tax should be entered upon the income tax return for such taxable year as payments to be applied against the tax shown on such return.

§ 301.6402-3 Special rules applicable to income tax.

(a) In the case of a claim for credit or refund filed after June 30, 1976—

(1) In general, in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made on the appropriate income tax return.

DEC 13 1999

(4)

No. 98-166

FILED
DEC 13 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DAVID H. BARAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a remittance of estimated taxes or of taxes withheld from wages is a payment of tax that is subject to the limitation on tax refunds set forth in Section 6511(b) of the Internal Revenue Code, 26 U.S.C. 6511(b).

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In the Supreme Court of the United States

No. 98-1667

DAVID H. BARAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The judgment and memorandum of the court of appeals (Pet. App. A1-A4) and the opinion of the district court (Pet. App. A5-A10) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1999. The petition for a writ of certiorari was filed on April 13, 1999, and was granted on September 28, 1999. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

The relevant portions of Sections 6151, 6315, 6401, 6402, 6511, and 6513 of the Internal Revenue Code, 26 U.S.C. 6151, 6315, 6401, 6402, 6511, and 6513, and of 26 C.F.R. 301.6402–3, are set forth at App., *infra*, 1a-7a.

STATEMENT

1. During 1988, petitioner's employer withheld a total of $4104 in federal income taxes from petitioner's wages and remitted those taxes to the United States. In January 1989, petitioner made an additional remittance to the United States of $1100 as an estimated tax for the fourth quarter of 1988.[1] Petitioner sought and was granted an extension of time, to August 15, 1989, in which to file his 1988 income tax return. Petitioner never sought nor received any further extension of time, and he did not file his return for that year until June 1, 1993. Pet. App. A3, A5-A6.[2]

[1] The remittance of estimated taxes was made by petitioner on IRS Form 1040-ES, which is a "Payment Voucher." C.A. App. 20. This Form specifies that the taxpayer is to make "your payment with this voucher" (*ibid.*). In completing and submitting this payment voucher Form, petitioner designated the sum of $1100 as the "[a]mount of payment" (*ibid.*).

[2] Although petitioner now attempts to construct a benign explanation for the late filing of his return (Pet. Br. 3-4 & 27 n.11), he has previously candidly acknowledged that his return "was late because the records needed to prepare the return were lost" by him (C.A. App. 34). Even though petitioner was aware that he had "either misplaced or lost the records * * * needed to file the return," he "didn't take any steps [to obtain that information] because for a long time I was hoping that those records would show up." *Id.* at 59, 60. He stated that he was in no hurry to obtain the information because he thought he "possibly * * * had overpaid the taxes * * * and I thought that all I was doing was delaying a refund." *Id.* at 60. He did not remember any "details" of attempting to get the records but stated that he contacted a "local office here in Washington" seeking to have his tax records "transferred to Washington so that I could discuss it with someone here and I was unsuccessful in getting that done." *Id.* at 61. Petitioner never identified the date or context of these purported discussions with the "local office," but has acknowledged that (i) he first made a written request for information from the Internal Revenue Service *after* the Service wrote to him concerning his failure to file a return (Pet. Br. 3) and, (ii) upon receiving that written request, the Service promptly furnished him with copies of the information that he claimed to need (*id.* at 4).

On the untimely 1988 return that petitioner filed in 1993, he claimed that his 1988 taxes had been overpaid by $1175, and he sought to have that overpayment credited against his outstanding tax obligations for 1989. The Internal Revenue Service assessed the tax liability reported by petitioner on his belated 1988 return but denied the requested credit of the overpayment. Pet. App. A3, A6. The Service concluded that the requested credit was barred by Section 6511(b) of the Internal Revenue Code, which specifies that "the amount of [any] credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return." 26 U.S.C. 6511(b)(2)(A). Because petitioner's refund claim was filed after the period described in Section 6511(b)(2)(A) had expired, no refund or credit could be allowed on the untimely claim.

2. Petitioner thereafter commenced this refund suit in federal district court. Petitioner claimed that the withheld and estimated tax remittances made with respect to his 1988 liability were "deposits" rather than "payments" of tax and that the statutory limitations on the recovery of taxes based upon the time "the tax [was] paid" (26 U.S.C. 6511(b)(2)(A)) therefore did not bar his refund claim. Pet. App. A3, A6.

The district court rejected petitioner's claim. The court held that the remittances of withholding and estimated taxes constituted "payments" of tax that were subject to the statute of limitations. After these pay-

ments were made, more than four years elapsed before petitioner filed his tax return and refund claim. Pet. App. A6. Because the refund claim was thus not made within the three-year period permitted under Section 6511(b)(2)(A), the court held that petitioner's claim was barred by the plain text of the statute. Pet. App. A8.

In so ruling, the court rejected petitioner's reliance on *Rosenman* v. *United States*, 323 U.S. 658 (1945). The court explained (Pet. App. A8) that *Rosenman* is premised on the existence of an "interim arrangement" between the taxpayer and the Internal Revenue Service under which money is remitted and "held not as taxes duly collected * * * but as a deposit in the nature of a cash bond" (323 U.S. at 662). In the present case, petitioner cannot "point to any analogous arrangement between himself and the IRS in which he indicated that he wished [the] remittance to be held as a cash bond or 'deposit.'" Pet. App. A8.

3. The court of appeals affirmed. Pet. App. A1-A4. The court held that the contention that the remittances of withheld and estimated taxes were deposits rather than payments of tax is "foreclosed by the plain language of the statute" (*id.* at A3):

> Section 6513(b)(1) provides that any amount of tax withheld from wages is "deemed to have been paid" by the recipient of the income on April 15 of the following year. Similarly, § 6513(b)(2) provides that any amount paid as estimated tax shall be "deemed to have been paid" on April 15 of the following year.

The court concluded that the remittances of withheld and estimated taxes "were payments as a matter of law" under the plain text of these statutory provisions. Pet. App. A3. The court explained that the rationale of

Rosenman does not apply to a case, such as the present one, which involves a "statutorily defined payment" rather than a consensual deposit arrangement. Pet. App. A4.

SUMMARY OF ARGUMENT

Remittances of estimated taxes and of taxes withheld from wages are "payments" of income tax that are subject to the limitation on tax refunds set forth in Section 6511(b) of the Internal Revenue Code. In enacting the provisions of Section 6513(b) of the Code, Congress specified that such remittances are payments of income tax that, for the purpose of the tax refund provisions of the Code, are "deemed to have been paid" on the date the return is first due. 26 U.S.C. 6513(b)(1), (2). Because petitioner's claim for refund was made more than three years after the date on which his payments were "deemed to have been paid" under Section 6513(b), it is barred by the plain language of the statute of limitations contained in Section 6511(b)(2)(A).

Petitioner is wrong in ignoring these controlling statutory provisions and in asserting that a "payment" cannot be made without an "assessment" of tax. The liability of any taxpayer for the federal income tax arises upon his receipt of "taxable income" (26 U.S.C. 1(a)). Numerous provisions of the Code make clear that this liability does not depend on any subsequent assessment of the tax by the Internal Revenue Service. In particular, Section 6151(a) specifies that the obligation to pay the tax is fixed by law, "without assessment" or any notice or demand, on the due date of the return. 26 U.S.C. 6151(a). The Code further makes clear that the liability for tax which arises upon the receipt of income may be collected in a suit brought "without assessment" of the tax. 26 U.S.C. 6501. An assessment is not a

prerequisite to liability; it is instead an administrative determination which, when made, confers *additional* administrative enforcement powers (such as liens and levies) on the Service. Under the Internal Revenue Code, taxes are to be paid, and routinely are paid, "without assessment."

Petitioner errs in contending that the decision of this Court in *Rosenman* v. *United States*, 323 U.S. 658 (1945), compels a different conclusion. In *Rosenman*, the Court concluded that a "deposit" (as distinguished from a "payment") occurs when the taxpayer and the government enter into a "business transaction" or "arrangement" under which a remittance is tendered by the taxpayer, and accepted and treated by the government, as a "deposit * * * in the nature of a cash bond." 323 U.S. at 662, 663. The facts of this case plainly reflect that petitioner did not designate his remittances as "deposits" and that the United States and petitioner made no consensual deposit "arrangement" of the type described by the Court in *Rosenman*. In view of the fact that petitioner failed to comply with the regulatory prerequisites for a "deposit" to be accepted by the United States, it cannot be said either as a matter of fact or of law that the United States entered into a consensual deposit relationship. Moreover, the statutes under which the remittances involved in this case were made specify that any "tax withheld from wages" or "paid as estimated income tax" for the year "shall be deemed to have been paid" on the date the return is first due. 26 U.S.C. 6513(b)(1), (2). That statute "conclusively determines" that withholding taxes and estimated taxes are "for statute of limitations purposes deemed 'paid' on the April 15th following the close of

the tax year." *Ehle* v. *United States*, 720 F.2d 1096, 1097 (9th Cir. 1983) (per curiam).

Under Section 6513(b), remittances of withholding and estimated taxes are "necessarily payments rather than deposits" for purposes of the statute of limitations on tax refunds. *Ott* v. *United States*, 141 F.3d 1306, 1309 (9th Cir. 1998). Because petitioner made his claim for refund more than three years after he paid the tax, his refund claim is barred by the plain language of Section 6511(b)(2)(A) and was therefore properly denied in this case.

ARGUMENT

I. REMITTANCES OF ESTIMATED TAXES AND OF TAXES WITHHELD FROM WAGES CONSTITUTE PAYMENTS OF TAX THAT ARE SUBJECT TO THE LIMITATION ON TAX REFUNDS SET FORTH IN SECTION 6511(b) OF THE INTERNAL REVENUE CODE

Section 6511 of the Internal Revenue Code establishes an intricate and comprehensive structure for the disposition of all tax refund claims—a structure that combines the requirement of a prompt presentation of the claim with several substantive limits on recovery. 26 U.S.C. 6511(a), 6511(b).[3] With respect to a tax for

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[3] Sections 6511(a) and 6511(b) were enacted in essentially their current form as part of the Internal Revenue Code of 1954 (ch. 736, 68A Stat. 808). The precursor of these provisions was Section 281(b) of the Revenue Act of 1924, ch. 234, 43 Stat. 301, in which Congress (i) provided a finite period during which a claim for refund of income, war and excess profits taxes could be made and (ii) then further specified that "[t]he amount" of any refund of such taxes shall not "exceed the portion of the tax paid during the" period expressly permitted for the refund claim to be filed. Similarly, Section 322(b) of the Revenue Act of 1932 (ch. 209, 47

which a return is required (such as an income tax), Section 6511(a) requires that an administrative refund claim be filed within three years of the time the return was filed or two years of the time the tax was paid, "whichever of such periods expires the later." 26 U.S.C. 6511(a).[4] In addition to this time limitation on

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Stat. 242) provided a two-year period of limitation for the filing of claims for refund of income taxes—calculated from the time of payment—and also limited the refund to the amount of tax paid within the two years prior to the filing of the claim. See *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 527, 530 (1947). Section 810 of the Revenue Act of 1932, ch. 209, 47 Stat. 283, provided a similar structure for estate tax refunds in order "to remove all question as to the precise effect of a period of limitation on refunds which runs from the payment of the tax." S. Rep. No. 665, 72nd Cong., 1st Sess. 53 (1932). Section 6511 brought these various provisions into a single statute that governs the payment of refund claims for "any tax imposed" under the Internal Revenue Code. 26 U.S.C. 6511(a).

[4] No suit for the recovery of an internal revenue tax is permitted unless the taxpayer has "duly filed" an administrative claim for refund "according to the provisions of law" (26 U.S.C. 7422(a)). The applicable "provisions of law" are those set forth in Section 6511 of the Code, 26 U.S.C. 6511. If a taxpayer fails to file a timely claim for refund under Section 6511(a) of the Code, no refund of a claimed overpayment of the tax is allowable. 26 U.S.C. 6511(b)(1).

In *Miller* v. *United States*, 38 F.3d 473, 475-476 (9th Cir. 1994), the court concluded that an untimely return cannot extend the time for filing an administrative claim for refund under Section 6511(a) of the Code. Under the reasoning of that decision, the claim of petitioner in the present case would be barred because it was filed more than three years after the date that the return was due. See *ibid.* The Internal Revenue Service has not, however, contended that a late-filed return does not constitute a "return" for purposes of the three-year statute of limitations on the filing of administrative refund claims under Section 6511(a). See Rev. Rul. 76–511, 1976–2 C.B. 428. The issue that the court of appeals raised and resolved on its own initiative in the *Miller* case was therefore not raised, and is not presented, in this case.

the presentation of a refund claim under Section 6511(a), Congress has imposed specific "substantive limitations on the amount of recovery" on tax refund claims under Section 6511(b) of the Code. *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997). These substantive limitations are set forth in "unusually emphatic form." *Id.* at 350. When, as in the present case, a refund claim is filed within three years of the filing of the return, this statute specifies that (26 U.S.C. 6511(b)(2)(A)):

> the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return * * * .

All of petitioner's withholding and estimated tax remittances were actually tendered to the government more than four years before his return and refund claim were filed (Pet. App. A6). Under Section 6513(b) of the Code, Congress has specified that such mid-year payments of withholding tax and estimated tax are "deemed" to be "paid" on the subsequent date that the return for that year is due. 26 U.S.C. 6513(b)(1)-(2). Moreover, in enacting (what is now) Section 6513(b), Congress emphasized that such remittances are deemed to be paid on the date the return is first due "for the purpose of the provisions of law relating to refund or credit" of the income tax. H.R. Conf. Rep. No. 510, 78th Cong., 1st Sess. 54 (1943). See pages 27-29, *infra*. Because petitioner's claim for refund was made more than three years after the date on which his payments were "deemed to [be] paid" under Section 6513(b), the court of appeals correctly held that, under Section 6511(b)(2)(A), these payments may not now be

refunded under the "plain language of the statute" (Pet. App. A3). Accord, *Ott* v. *United States*, 141 F.3d 1306, 1309-1310 (9th Cir. 1998); *Gabelman* v. *Commissioner*, 86 F.3d 609, 612 (6th Cir. 1996); *Ehle* v. *United States*, 720 F.2d 1096, 1097 (9th Cir. 1983).[5]

II. REMITTANCES OF WITHHOLDING TAXES AND ESTIMATED TAXES ARE "PAYMENTS" OF TAX AND ARE NOT "DEPOSITS"

Notwithstanding the plain language of these interrelated statutory provisions, petitioner asserts that withholding and estimated tax payments should not be "deemed to have been paid" on the date the return is due (26 U.S.C. 6513(b)(1), (2)) and should not be treated as "payments" of tax to which the limitations of Section 6511(b) apply. None of the rationales offered by petitioner is correct.

1. Petitioner's principal contention is that a taxpayer can not properly be regarded as having "paid" a tax at any time before his liability is "defined, known, and fixed by assessment" (Pet. Br. 9). He asserts that, until the amount of his liability is formally assessed, withholding and estimated tax payments can represent only "deposits" rather than "payments" of tax—and that the limitation on refunds set forth in Section 6511(b) therefore does not apply to this case.

There are numerous flaws in this contention. In particular, it ignores the fact that the liability of any

[5] This Court has frequently emphasized that statutes that prescribe the limitations on a consent to suit by the United States are to be strictly construed in favor of the government. E.g., *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941); *United States* v. *Michel*, 282 U.S. 656, 659 (1931) (a tax refund "suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued").

taxpayer for the federal income tax arises upon his receipt of "taxable income" (26 U.S.C. 1(a)). This liability does not depend on any subsequent assessment of the tax by the Internal Revenue Service. To the contrary, Section 6151(a) of the Code specifies that the obligation to pay the tax is fixed by law, "without assessment" or any notice or demand, on the due date of the return. 26 U.S.C. 6151(a) ("the person required to make such return *shall, without assessment* or notice and demand from the Secretary, *pay such tax* * * * at the time and place fixed for filing the return") (emphasis added).[6] As this Court stated in *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, 565 (1950), on the date a return is required to be filed, "the taxpayer has a positive obligation to the United States: a duty to pay its tax." See also 26 U.S.C. 6012(a), 6072; *Blatt* v. *United States*, 34 F.3d 252, 256-257 (4th Cir. 1994) (estimated tax is a "payment" of tax because tax is due and payable without assessment).

Other provisions of the Internal Revenue Code similarly reflect that a taxpayer's obligation to pay the tax exists independently of an "assessment." For example, Section 6213(b)(4) specifies that "*[a]ny amount paid* as a tax or in respect of a tax *may be assessed* upon the receipt of such payment." 26 U.S.C. 6213(b)(4) (emphasis added). In enacting this provision, Congress plainly contemplated that "payment" may precede "assessment." Similarly, Section 6401(c) specifies that "[a]n amount paid as tax" may be refunded as an

[6] From the first enactment of these provisions, the Treasury Department has consistently ruled that the applicable period of limitations on tax refund claims runs from the date of payment of the tax, rather than from the date that the tax is assessed. See S.M. 3380, IV-1 C.B. 80 (1925).

"overpayment" even though "there was no tax liability in respect of which such amount was paid." 26 U.S.C. 6401(c). Petitioner's contention that a "payment" cannot occur until after the "tax liability" has been determined is simply irreconcilable with the structure and text of the Code.

The assessment serves a function far different from that posited by petitioner. The United States has a variety of statutory tools to enforce the taxpayer's "duty to pay its tax" (*Manning* v. *Seeley Tube & Box Co.*, 338 U.S. at 565). Even "without assessment," the United States may bring a collection suit against the taxpayer in federal district court. 26 U.S.C. 6501(a). When the Service makes an assessment, however, enforcement powers *in addition* to a collection suit are then granted under the Code. In particular, the federal lien for unpaid taxes, and the right to levy on the taxpayer's property to collect such taxes, arises only when "the assessment is made." 26 U.S.C. 6322; see also 26 U.S.C. 6331(a).[7]

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[7] The Internal Revenue Service generally does not make an assessment of tax until the taxpayer has filed his return and the return has been processed administratively. See 26 U.S.C. 6201(a)(1). A taxpayer who delays filing his return thereby delays the time of assessment.

Under the rule proposed by petitioner, all withholding taxes, estimated taxes, and even remittances accompanying tax returns would be merely "deposits" until the taxpayer eventually files the return, the Service processes the return and makes an administrative determination of the amounts due, and makes an assessment of the resulting tax. If such remittances were treated as "deposits," rather than as "payments," taxpayers would receive no interest on any funds thereafter returned, for interest accrues only from the date of an "overpayment" (26 U.S.C. 6611(b)(2)). As commentators have noted, the position advocated by petitioner that all remittances before assessment are "deposits" would disadvantage the ordinary taxpayer who would lose the interest to which he would otherwise be entitled from overpayments of tax that result from excess withholding. See M. Saltzman, *IRS Practice and Procedure* ¶ 11.05[1][b], at 11-33 (2d ed. 1991).

In the words of the Code, an "assessment" is made "by *recording* the liability of the taxpayer in the office of the Secretary." 26 U.S.C. 6203 (emphasis added). An assessment is only an administrative "record[]" of liability, not a prerequisite to it. As the court explained in *Moran* v. *United States*, 63 F.3d 663, 666 (7th Cir. 1995) (emphasis added and citations omitted):

> Though the [taxpayers] make it out to be more, an assessment is only a formal determination that a taxpayer owes money. *Stevens v. United States*, 49 F.3d 331, 336 (7th Cir. 1995). It is more or less a bookkeeping procedure that permits the government to bring its administrative apparatus to bear in collecting a tax. *Laing v. United States*, 423 U.S. 161, 170 n.13 (1976); 26 U.S.C. § 6203. Indeed, our tax system would function poorly were not most taxes "self-assessed." *United States v. Boyle*, 469 U.S. 241, 249 (1985). A formal IRS assessment is an important determination in many cases, and the threat of one is a significant means of maintaining a system of voluntary compliance, *see United States v. National Bank of Commerce*, 472 U.S. 713, 721 (1985), but *it is neither the beginning nor the end of tax liability.*

The only appellate authority that supports petitioner's erroneous proposition is a case that he has failed to cite. In *Thomas* v. *Mercantile National Bank*, 204 F.2d 943, 944 (1953), the Fifth Circuit held that a tax liability cannot be "paid" by a remittance made before the tax is assessed because, absent an assessment,

there is "no liability on the part of the taxpayer, and consequently nothing to pay."[8] Numerous provisions of the Code clearly reflect, however, that the liability to pay attaches "without assessment" of the tax. *E.g.*, 26 U.S.C. 6151(a), 6501(a). The other courts of appeals have therefore consistently and correctly rejected the Fifth Circuit's reasoning. See, *e.g.*, *Zeier* v. *IRS*, 80 F.3d 1360, 1364 (9th Cir. 1996); *Moran* v. *United States*, 63 F.3d at 667-668; *Ewing* v. *United States*, 914 F.2d 499, 502-503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991).[9] Indeed, the Fifth Circuit has itself twice

[8] The Federal Circuit adopted a variant of the Fifth Circuit rule in *New York Life Insurance Co.* v. *United States*, 118 F.3d 1553, 1559 (1997), cert. denied, 523 U.S. 1094 (1998). The court held that a remittance must be treated as a deposit "as a matter of law" when it is tendered before the tax is assessed and with an accompanying "protest" of the underlying liability. As the Seventh Circuit correctly concluded in rejecting that contention in *Moran* v. *United States*, 63 F.3d at 669, however, the fact that a "protest" accompanies the remittance cannot transmute a payment into a deposit, for the Code expressly specifies that taxes may be "*paid* under protest" (26 U.S.C. 7422(b) (emphasis added)). The notion that a "protest" is relevant to the determination whether a taxpayer can obtain a refund of tax is an anachronism. Prior to the passage of the Revenue Act of 1924, a taxpayer could recover an overpaid tax by suit only if the tax had been paid under protest. Section 1014 of the 1924 Act eliminated that requirement. See S. Rep. No. 398, 68th Cong., 1st Sess. 44-45 (1924).

[9] In *United States* v. *Dubuque Packing Co.*, 233 F.2d 453 (1956), the Eighth Circuit followed the Fifth Circuit's decision in *Mercantile National Bank* in holding that a remittance held by the IRS in a suspense account did not constitute payment until the tax was formally assessed. In *Essex* v. *Vinal*, 499 F.2d 226 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975), however, without discussing its prior decision in *Dubuque Packing Co.*, the Eighth Circuit held that a remittance of estimated taxes prior to assessment

questioned and criticized the reasoning of its decision in *Thomas*, noting that "payment" routinely precedes assessment under the Code and, in "most situations tax is paid with no coercive involvement of the federal tax authorities whatsoever." *Ford* v. *United States*, 618 F.2d 357, 359 (5th Cir. 1980). See also *Harden* v. *United States*, 74 F.3d 1237 (5th Cir. 1995).

2. a. Petitioner errs in contending (Pet. Br. 9, 23) that the decision of this Court in *Rosenman* v. *United States*, 323 U.S. 658 (1945), establishes a broad rule that every remittance made before assessment is a "deposit" rather than a "payment" of tax. As every court of appeals (including the Fifth Circuit) has concluded, the *Rosenman* case is not based on any such broad rule. Instead, it is based on a recognition that the underlying facts may sometimes reflect that the Internal Revenue Service and the taxpayer have agreed to treat a particular remittance as a "deposit" and not as a "payment" of tax to which the refund limitations of Section 6511(b) apply. As the court stated in *Dantzler* v. *United States Internal Revenue Service*, 183 F.2d 1247, 1252 (11th Cir. 1999), "[i]n *Rosenman*, the Court did not have before it the question whether there can be payment of tax without assessment, and it made no ruling in that regard." See also *Ford* v. *United States*, 618 F.2d at 359 ("*Rosenman* does not foreclose treating as a tax payment a remittance made prior to assessment"); *Fortugno* v. *Commissioner*, 353 F.2d 429, 435 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966) (same).

In *Rosenman*, the Court drew a distinction between a remittance tendered as a "payment" of tax—which triggers the limitations applicable to tax refund suits—

constituted a payment when the taxpayer and the IRS treated it as such.

and a remittance tendered as a "deposit"—which is not subject to those limitations. The distinction framed by the Court in *Rosenman* between tax "deposits" and tax "payments" is not grounded in any provisions of the Internal Revenue Code. The Code, which strictly regulates tax refund suits "in a highly detailed technical manner" (*United States* v. *Brockamp*, 519 U.S. at 350), contains no provision for the "deposit" of income tax remittances by a taxpayer.[10] Instead, in language that "cannot easily be read as containing implicit exceptions" (*ibid.*), Section 6511(b) comprehensively establishes unqualified limitations on the recovery of any taxes "paid" in any manner to the United States.

In *Rosenman*, however, based upon what the Court concluded was then-prevailing administrative practice, the Court held that a "deposit" occurs when a remittance is tendered to the government as part of an "interim arrangment" to cover "future" contingencies and is not tendered to "discharge * * * a liability" or to "pay one that was asserted." 323 U.S. at 662. In *Rosenman*, a remittance of estate taxes had been tendered under protest by the taxpayer and had been

[10] The Code contains narrow provisions that authorize "deposits" for specific purposes, such as special excise taxes (26 U.S.C. 6302(f)), amounts withheld at the source and required to be deposited at certain financial institutions (26 U.S.C. 6302(g), 6656), certain bonding requirements (26 U.S.C. 7101, 7485), and amounts seized as the result of a criminal investigation (26 U.S.C. 7608). Section 7809 of the Code, however, generally specifies that "the gross amount of *all taxes and revenues received* under the provisions of this title, *and collections of whatever nature received or collected by authority of any internal revenue law, shall be paid daily into the Treasury* of the United States * * * *as internal revenue collections* * * * [and that a] certificate of such payment * * * shall be transmitted to the Secretary." 26 U.S.C. 7809(a) (emphasis added).

held by the Service in a non-interest bearing "suspense" account. The Court stated that a taxpayer would enter into such a "deposit arrangement" to stop the running of penalties and interest and that the government, in exchange, obtained a "cash bond for the payment of taxes thereafter found to be due." *Ibid.* The Court stated in *Rosenman* that the government had given a "practical construction * * * [t]o such arrangements" and "does not consider" such advances from the taxpayer to constitute "tax payments." *Ibid.*

"[I]nterpret[ing] a business transaction according to its tenor," the Court concluded that "receipt by the Government of moneys under such an arrangement" constitutes a "deposit" rather than a "payment" of tax. *Rosenman* v. *United States*, 323 U.S. at 662, 663. The rationale of the Court was that a "deposit" (as distinguished from a "payment") occurs when the taxpayer and the government expressly or impliedly enter upon a "business transaction" or "arrangement" under which the remittance is tendered by the taxpayer, and accepted and treated by the government, as a "deposit * * * in the nature of a cash bond." *Id.* at at 662.[11]

[11] There is no provision in the Internal Revenue Code that creates a cause of action for a suit to recover a non-interest-bearing "deposit." The Tucker Act would provide jurisdiction for a claim to recover a "deposit" only if it were based upon an express or implied-in-fact contract with the United States. Since the federal courts lack jurisdiction to create and enforce claims against the United States based upon contracts "implied in law" (see, *e.g.*, *United States* v. *Minnesota Mut. Inv. Co.*, 271 U.S. 212, 217 (1926); *Merritt* v. *United States*, 267 U.S. 338, 341 (1925)), any "deposit arrangement" concerning a remittance of funds to the United States must be premised upon an express or implied-in-fact contract.

b. In the present case, there was plainly no consensual deposit "arrangement" of the type described by the Court in *Rosenman* between petitioner and the United States. Indeed, there were no direct communications of any type between petitioner and the government concerning the treatment to be given the remittances of withholding and estimated taxes at issue. The only expression of intent evidenced by petitioner was his use of the Form 1040-ES "Payment Voucher," under which he submitted $1100 as the "amount of payment" of his estimated taxes (C.A. App. 20). See note 1, *supra*. In *Rosenman*, unlike in the present case, the remittance had been accompanied by a letter stating that it was made "under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the [taxpayer] that not all of this sum is legally or lawfully due." 323 U.S. at 660. Moreover, unlike the present case, in which the taxpayer was entitled to receive interest on his "overpayment" if he filed a timely return (26 U.S.C. 6611(b)(2), (3)), the Service placed the remittance in *Rosenman* in a *non*-interest bearing "suspense account" to the credit of the estate. 323 U.S. at 662. See also note 7, *supra*. It was in that distinctly different factual context that the Court concluded in *Rosenman* that an implied-in-fact "business transaction" or "arrangement" had been made between the taxpayer and the government to treat the remittance as a "deposit * * * in the nature of a cash bond." *Id.* at 662.

Moreover, as the court of appeals noted, the statutes under which the remittances involved in this case were made specify that any "tax withheld from wages" or "paid as estimated income tax" for any year "shall be 'deemed to have been paid' on April 15 of the following

year." Pet. App. A3 (quoting 26 U.S.C. 6513(b)(1)-(2)). These provisions of Section 6513(b), which are entitled "Prepaid income tax" (26 U.S.C. 6513(b)), negate any implication that only a deposit, rather than a "payment," was intended. Instead, as the court of appeals correctly concluded in this case, remittances of withheld and estimated taxes constitute "payments as a matter of law" under these statutory provisions. Pet. App. A3. See pages 24-29, *infra*.

c. Following this Court's decision in *Rosenman*, the Treasury Department adopted rules that set forth the specific circumstances and conditions under which the government will accept a remittance as a consensual "deposit" rather than as a "payment" of taxes (Rev. Proc. 84–58, 1984–2 C.B. 501 (superseding Rev. Proc. 82–51, 1982–2 C.B. 839); see also Rev. Rul. 89–6, 1989–1 C.B. 119; Rev. Proc. 82-51, 1982-2 C.B. 839). Since there is no statutory basis in the Internal Revenue Code for the making of tax "deposits" by individual taxpayers, a taxpayer cannot be said to have entered into a consensual "arrangement" with the United States for a "deposit," rather than a "payment," if he has failed to comply with the conditions expressly adopted for this purpose by the Treasury. See note 11, *supra*. These conditions—which include a requirement that the taxpayer *expressly* designate the remittance as a "deposit"—were plainly not met in this case.[12] See

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[12] Under the procedures specified by the Treasury, a taxpayer —typically one under audit who expects to receive an adverse determination—must expressly designate the remittance as a deposit. If the taxpayer makes a "deposit," the Service does not consider the remittance to be a "payment" of tax. The deposit stops the running of interest on the unpaid tax liability and is returnable on demand, without interest, until such time as the Service is authorized to make the assessment. Rev. Proc. 84-58, §§

Pet. App. A6. There was thus manifestly no express or implied-in-fact consensual "business transaction" or "arrangement" between petitioner and the United States for a "deposit" rather than a "payment" to be made.

The essential prerequisites for application of this Court's decision in *Rosenman* are not satisfied in this case. Petitioner's refund claim must therefore be denied because, in filing his belated claim, he failed to "conform strictly to the requirements of Congress." *Rosenman* v. *United States*, 323 U.S. at 661.

d. There have been significant changes in the applicable provisions of the Internal Revenue Code since the *Rosenman* case arose. In particular, at the time of the disputed remittance in *Rosenman*, the Internal Revenue Service had taken the position that interest would not accrue on an overpayment of a disputed liability if it turned out that the taxpayer owed no taxes. That fact played a significant role in the Court's reasoning. The Court noted that, "where taxpayers have sued for interest on the 'overpayment' of moneys received under similar conditions, the Government ha[d] insisted that the arrangement was merely a 'deposit' and not a 'payment'" on which interest "is due

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401.3, 402.1, 1984-2 C.B. at 502. See M. Saltzman, *supra*, at 11-33, 11-34. The Treasury has recently issued a temporary regulation providing that "[s]ums submitted with an offer to compromise a liability or during the pendency of an offer to compromise are considered deposits and will not be applied to the liability until the offer is accepted unless the taxpayer provides written authorization for application of the payments." 64 Fed. Reg. 63,557 (1999) (to be codified at 26 C.F.R. 301.7122-1T(g)). The temporary regulation further provides that any refunds of such deposits are without interest. *Ibid.*

from the Government." 323 U.S. at 662. The Court emphasized that (*id.* at 663):

> If it is not payment in order to relieve the Government from paying interest on a subsequently determined excess, it cannot be a payment to bar suit by the taxpayer for its illegal retention. It will not do to treat the same transaction as payment and not as payment, whichever favors the Government.

By the time that *Rosenman* was decided in 1945, however, Congress had amended the Code to require interest to be paid on remittances that result in overpayments even if "there was no tax liability in respect of which such amount was paid." 26 U.S.C. 6401(c) (added by Section 4(d) of the Current Tax Payment Act of 1943, 57 Stat. 140). Because that provision was enacted after the remittances involved in *Rosenman* occurred, the Court expressly declined to "consider the effect" of that statute in that case. 323 U.S. at 663. In enacting that statute, however, Congress has authoritatively established that interest accrues on overpayments received in the context addressed in *Rosenman* and in the precise context of the present case.

For example, although petitioner is correct in asserting (Pet. Br. 7) that he would not be entitled to interest on his claimed 1988 overpayment until he filed his return in 1993, that is not because the government did not consider his remittances to be "payments" of tax on which interest could accrue, as was the case in *Rosenman*. Instead, it is because, while interest generally accrues from the date of any "overpayment" (26 U.S.C. 6611(b)(2)), it does not accrue until "the return is filed" when (as in this case) the taxpayer files an untimely return (26 U.S.C. 6611(b)(3)). Congress adopted the latter provision because "it is inappropriate to require

that the United States pay interest" when the taxpayer has failed to file a timely return and thereby failed to give notice to the government "that it owes such an amount." S. Rep. No. 494, 97th Cong., 2d Sess. (Vol. 1) 307 (1982).

By the time that this Court decided *Rosenman*, the Service's prior position that advance payments were not to be treated as interest-bearing "overpayments" if a tax was not actually owed had thus been legislatively overruled. The need described by the Court in *Rosenman* for some symmetry in the treatment of interest accruing on "overpayments" and "underpayments" of tax has thus now been authoritatively addressed by Congress through the specific statutory provisions enacted to resolve that issue.

3. The courts of appeals have adopted distinct and conflicting lines of authority in applying this Court's decision in *Rosenman*.[13]

a. One line of cases holds that the nature of the remittance depends on the taxpayer's "intent" in making the remittance. See, *e.g.*, *Zeier* v. *IRS*, 80 F.3d at 1360; *Moran* v. *United States*, 63 F.3d at 667-668; *Ewing* v. *United States*, 914 F.2d 499, 502-503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991); *Ameel* v. *United States*, 426 F.2d 1270, 1273 (6th Cir. 1970); *Fortugno* v. *Commissioner*, 353 F.2d at 435; *Lewyt Corp.* v. *Commissioner*, 215 F.2d 518, 522-523 (2d Cir. 1954), aff'd in part and rev'd in part on another issue, 349 U.S.

[13] The most extreme position, which all other courts have rejected (and which petitioner has failed even to cite), is that adopted by the Fifth Circuit in *Thomas* v. *Mercantile National Bank*, 204 F.2d 943 (1953). See page 13, *supra*. Petitioner cavalierly dismisses the entire body of appellate authority on the question presented in this case as simply "the eroding glosses [on *Rosenman*] of subordinate court judges" (Pet. Br. 10).

237 (1955). These courts have consistently rejected the conclusion of the Fifth Circuit that "there can be no payment of tax before the IRS makes a formal assessment of the * * * tax liability" (*Zeier* v. *IRS*, 80 F.3d at 1364). See page 14, supra. They hold, instead, that the taxpayer's intent is to be derived from the surrounding "facts and circumstances." A payment under the facts-and-circumstances test would be evidenced by the taxpayer's recognition of a tax obligation, whether by association with a return filing, the resolution of a dispute by an agreement, or other similar circumstances indicating the taxpayer's assumption of a liability. See *Ewing* v. *United States*, 914 F.2d at 504; *Ameel* v. *United States*, 426 F.2d at 1272–1273. A deposit, by contrast, would be evidenced by circumstances showing the remittance was in the nature of a bond paid in escrow to halt the accrual of interest on an anticipated liability.

Under this line of cases, the remittance of withholding and estimated taxes would quite plainly be "payments" rather than "deposits." The remittance of estimated taxes was made on a "payment voucher," which states that the taxpayer tendered $1100 as the "amount of payment." C.A. App. 20. Petitioner acknowledged that, by making these remittances, he "possibly[] had overpaid the taxes" and that, by failing to make a timely return, he was "delaying a refund" of that overpayment. *Id.* at 60. In making these remittances, moreover, petitioner did not provide any instruction or request that they be treated as deposits, as the applicable Treasury regulations require. See note 12, *supra*. The failure of the taxpayer expressly to designate the remittance as a deposit under these regulations negates the existence of any consensual deposit

relationship, both as a matter of "intent" and as a matter of law. See notes 11, 12, *supra*.[14]

b. A separate line of appellate authority looks to the specific statutory provision under which the remittances were made to determine whether the "remittances were payments as a matter of law" (Pet. App. A3). Certain specific types of remittances—such as estimated taxes and wage withholdings made under Section 6513 of the Code—have been found to constitute "payments" rather than "deposits" as a matter of law, even in the absence of any prior assessment of the tax and even in the face of a contrary expression of intent by the taxpayer.[15] See, *e.g.*, *Dantzler* v. *United States*, 183 F.3d at 1250–1251 (estimated taxes); *Ertman* v. *United States*, 165 F.3d 204 (2d Cir. 1999) (same); *Ott* v. *United States*, 141 F.3d 1306, 1309–1310 (9th Cir. 1998) (same); *Gabelman* v. *Commissioner*, 86 F.3d 609, 612–613 (6th Cir. 1996) (same); *Weigand*

[14] The fact-intensive inquiry sometimes pursued under this "facts and circumstances" test is often wasteful of judicial and taxpayer resources and should almost never be necessary. It should, in particular, be unnecessary when (as in the present case) the taxpayer has not complied with the regulatory requirement that there be an express designation of the remittance as a "deposit" at the time it is made. See note 12, *supra*. Since that is the only circumstance (other than an express offer of compromise, see *ibid.*) under which the United States has agreed to accept a "deposit," an express or implied-in-fact consensual deposit relationship could not exist in the absence of such a designation.

[15] As the Ninth Circuit stated in *Zeier* v. *Internal Revenue Service*, 80 F.3d at 1364, a taxpayer's ostensible intent to make a deposit can not "defeat a statutory mandate" that the remittance be regarded as a payment of tax.

v. *United States*, 760 F.2d 1072 (10th Cir. 1985) (same); *Ehle* v. *United States*, 720 F.2d 1096 (9th Cir. 1983) (wage withholdings). These courts have concluded that the question whether a taxpayer "intended" withheld taxes or estimated taxes to be a "deposit" is irrelevant because Section 6513(b) of the Code specifies that such taxes are "deemed to have been paid" on the date the return for that year is due. 26 U.S.C. 6513(b)(1)-(2). See *Ott* v. *United States*, 141 F.3d at 1309–1310; *Ehle* v. *United States*, 720 F.2d at 1097.[16]

[16] Petitioner errs in claiming (Pet. Br. 14) that *Schmidt* v. *Commissioner*, 272 F.2d 423 (9th Cir. 1959), *Plankinton* v. *United States*, 267 F.2d 278 (7th Cir. 1959), and *Trevelyan* v. *United States*, 219 F. Supp. 716 (D. Conn. 1963), support a conclusion that Section 6513(b) does not control the date of payment of withholding and estimated taxes. The cases that petitioner cites were decided under the 1939 Code and are inapposite to this case. The 1954 and the 1986 Codes provide that estimated and withholding taxes are deemed to be paid by the taxpayer "*on* the 15th day of the fourth month" following the close of his taxable year. 26 U.S.C. 6513(b) (emphasis added). The comparable provision of the Internal Revenue Code of 1939 stated that such taxes were considered paid by the taxpayer "*not earlier than* the fifteenth day of the third month" following the close of his taxable year. 26 U.S.C. 322(e) (1952) (emphasis added). The ambiguous nature of that provision engendered confusion among the courts as to the date of payment of estimated and withholding taxes under the 1939 Code. For example, in *Schmidt* v. *Commissioner*, 272 F.2d at 428, the court concluded that estimated taxes remitted in 1944 were not considered "paid" under this statute until 1952, when the tax return for 1944 was filed. In *Plankinton* v. *United States*, *supra*, the court expressed a similar conclusion. In *United States* v. *Miller*, 315 F.2d 354 (10th Cir.), cert. denied, 375 U.S. 824 (1963), however, the court held that estimated taxes remitted to the government during the year were considered "paid" under the 1939 Code provision on the 15th day of the third month following the close of that year. See *Trevelyan* v. *United States*, 219 F. Supp. at 721-722. In enacting Section 6513(b) of the Code,

The court of appeals correctly applied that reasoning in this case to conclude that Section 6513(b) "conclusively determines that these remittances [of withholding and estimated taxes] were payments as a matter of law" (Pet. App. A3). Petitioner realized taxable income over the course of 1988 and, at the conclusion of the year, was obliged by law to pay taxes on that income. 26 U.S.C. 1, 61, 63, 6151. Petitioner paid those taxes through a combination of wage withholdings and an estimated tax remittance submitted with a Form 1040–ES. Under the express provisions of the Internal Revenue Code, the income taxes withheld by a taxpayer's employer from wages paid over the course of the tax year, and the amount that the taxpayer paid as estimated taxes during the tax year, were "deemed to have been paid" by the taxpayer as of April 15th of the following year. 26 U.S.C. 6513(b)(1), (2). Section 6513(b) "conclusively determines" that withholding taxes and estimated taxes are "for statute of limitations purposes deemed 'paid' on the April 15th following the close of the tax year." *Ehle* v. *United States*, 720 F.2d at 1097. See also *Gabelman* v. *United States*, 86 F.3d at 612. [17]

Congress eliminated this confusion by providing a fixed date on which estimated and withholding taxes are "deemed to have been paid." 26 U.S.C. 6513(a)(1), (2). The decisions in *Schmidt*, *Plankinton* and *Trevelyan* thus have no bearing on the proper interpretation and application of Section 6513 under the 1954 and 1986 Codes. *Chemical Bank New York Trust Co.* v. *United States*, 275 F. Supp. 26, 29–30 (S.D.N.Y.), aff'd per curiam, 386 F.2d 995 (2d Cir. 1967). See also *Moran* v. *United States*, 63 F.3d at 667–668.

[17] Petitioner errs in contending (Pet. Br. 12) that this Court's decision in *United States* v. *Habig*, 390 U.S. 222 (1968), supports a conclusion that the statute of limitations for petitioner's refund

The legislative history of these provisions makes this conclusion manifest. In enacting the withholding tax and estimated tax provisions in 1944, Congress explained that such remittances constitute "payment on account of the income * * * tax" for the tax year in which they are made. H.R. Conf. Rep. No. 510, 78th Cong., 1st Sess. 54 (1943); see *id.* at 28. Congress then emphasized that such withholding and estimated tax remittances constitute "payments" of income tax for the *specific purposes* of the statute of limitations on refunds. *Id.* at 54 (emphasis added):[18]

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claim should be measured from the date that petitioner filed his tax return for 1988 (in 1993) rather than the due date of that return (in 1989). In *Habig*, the appellees were charged with attempting to evade taxes by filing a false return and the question was whether the indictment in that case was timely. Under 26 U.S.C. 6531, the applicable period of limitation on prosecution was six years from the commission of the offense. That statute further provided that, "[f]or the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable." 26 U.S.C. 6531. The appellees contended in *Habig* that their prosecution was untimely because, under the rules of Section 6513, the statute of limitations expired six years after the date the return was *due* to be filed, rather than the later date that the fraudulent return was *actually* filed. 390 U.S. at 223. The Court noted, however, that Section 6513 "prolong[s] the limitations period when, and only when, a return is filed or tax paid in advance of the statutory deadline." 390 U.S. at 225. The Court held only that this statute does not shorten the six-year limitations period with respect to an offense committed by the *late* filing of a fraudulent return. *Id.* at 226. Nothing in that holding supports petitioner's position in this case.

[18] This passage in the Conference Report refers specifically to the estimated tax provision, which is now codified as Section 6513(b)(2). The identical provision for withholding taxes, which is now codified as Section 6513(b)(1), was enacted with the same

> The taxpayer will, of course, have to file his regular income tax return as usual, and on such return the estimated tax paid will be taken into account. All such payments of estimated tax are *for the purpose of the provisions of law relating to refund or credit* * * *, including the provisions relating to interest on overpayments of such tax, *deemed to have been paid on the [date the taxpayer's return is first due]*.

In providing in (what is now) Section 6513(b) that withholding and estimated tax payments are "deemed to have been paid" on the date the return is first due (26 U.S.C. 6513(b)(1), (2)), Congress thus expressly intended such remittances to be "deemed * * * paid" for the purpose of the statute of limitations "relating to refund or credit" (H.R. Cong. Rep. No. 510, *supra*, at 54).[19] Because Congress consciously designed these interrelated provisions for the express purpose of requiring withholding and estimated tax remittances to be treated as "payments" of tax for purposes of "the provisions of law relating to refund" (*ibid.*), such remittances are "necessarily payments rather than deposits" for purposes of the statute of limitations. *Ott* v. *United States*, 141 F.3d at 1309. See also *Ehle* v. *United States*, 720 F.2d at 1097; *Gabelman* v. *Commissioner*, 86 F.3d at 612–613; *David* v. *United States*, 964 F. Supp. 31, 37 (D. Mass.), aff'd, 80 A.F.T.R.2d 97-8427 (1st Cir. 1997); *United States* v. *Miller*, 315 F.2d at 359; *Holtvogt* v. *United States*, 887 F. Supp. 994 (S.D. Ohio 1995).

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language as part of this same legislation. See H.R. Conf. Rep. No. 510, *supra*, at 16.

[19] Petitioner states (Pet. Br. 18) that the legislative history of Section 6513 of the Code contains "no reference to [*Rosenman*] or its rationale." Since the provisions ultimately brought together in Section 6513(b) were first enacted in 1944, before *Rosenman* was decided in 1945, that should hardly be surprising. Moreover, in adopting the withholding and estimated tax provisions in 1944, Congress was not concerned with establishing mechanisms for consensual "deposits" of the type at issue in *Rosenman*. Instead, Congress was specifying precise dates on which withholding taxes and estimated taxes are "deemed to have been paid" (26 U.S.C. 6513(b)(1), (2)).

4. Petitioner's brief makes the novel contention (Pet. Br. 15) that the proper inquiry in a case such as this is *not* whether the remittances of withholding and estimated taxes were "payments" or "deposits" of tax but is, instead, "what tax obligation" those remittances pay. Petitioner asserts (*id.* at 7-9, 11-13, 15, 19) that withholding and estimated tax payments are somehow different and distinct from income tax payments, to which the limitations of Section 6511 apply.

That contention is squarely refuted by the text and history of Section 6513(b), as we have explained on pages 24-28, *supra*. Indeed, in adopting the withholding and estimated tax provisions, Congress expressly stated that such remittances are to "be considered payments on account of the income * * * tax * * * for the purpose of the provisions [of the Code] relating to refund or credit" of that tax. H.R. Conf. Rep. No. 510, *supra*, at 54; see *id.* at 20.

Petitioner's attempt to distinguish the withholding tax and the estimated tax from the income tax is thus fundamentally flawed. Withholding tax and estimated tax payments are simply methods of collecting *income* taxes as the income is earned and before the final amount of the tax has been determined. Remittances of withholding and estimated taxes may be refunded to the taxpayer only to the extent that they result in an overpayment of income tax. Section 6315 thus specifies that "*[p]ayment of the estimated income tax*, or any installment thereof, *shall be considered payment on*

account of the income taxes imposed * * * for the taxable year." 26 U.S.C. 6315 (emphasis added). Section 31(a)(1) similarly provides that the amount withheld as tax from wages is a credit against the taxpayer's income tax liability for that tax year. 26 U.S.C. 31(a)(1). If these amounts exceed the amount of the taxpayer's actual income tax liability, a refund is allowed "as an overpayment" of the income tax. 26 U.S.C. 6401(b)(1). See also 26 U.S.C. 6402(a).

Any refund or credit of an "overpayment" resulting from withholding or estimated tax payments, however, is limited to the amount of such payments made "within the applicable period of limitations." 26 U.S.C. 6402(a).[20] The "applicable period of limitations" is the period specified for a refund of income tax in Section 6511 of the Code. Because petitioner failed to comply with those statutory limits, his refund claim was properly denied in this case. [21]

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[20] Petitioner errs in seeking to compare the credit for taxes withheld (26 U.S.C. 31) with various other credits granted by the Code, such as those for childcare and the foreign tax credit, which become "payments of income tax only when they are applied on the taxpayer's return to the income tax" (Pet. Br. 22). The difference between withholding and estimated tax payments, and the various credits cited by petitioner, is that the former are to "be considered payments on account of the income * * * tax." H.R. Conf. Rep. No. 510, *supra*, at 54. When withholding or estimated tax payments in excess of the tax liability occur, the Code therefore specifies that "the amount of such excess shall be considered as an overpayment." 26 U.S.C. 6401(b)(1). See also 26 U.S.C. 6315.

[21] Petitioner points out (Pet. Br. 26-27) that a taxpayer who "was not subject to withholding, paid no estimates, and filed his income tax return ten or even twenty years late, making payment of the tax with the return" would still have three years in which to file a timely claim for refund under Section 6511(b). But see note 4, *supra*. In this case, however, petitioner's refund claim was filed *more than* three years after the taxes were paid. His refund claim is therefore barred by the express terms of Section 6511(b)(2)(A) of the Code, 26 U.S.C. 6511(b)(2)(A).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 6151(a) of the Internal Revenue Code, 26 U.S.C. 6151, provides in relevant part:

> Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).
>
> * * * * *

2. Section 6315 of the Internal Revenue Code, 26 U.S.C. 6315, provides in relevant part:

> Payment of the estimated income tax, or any installment thereof, shall be considered payment on account of the income taxes imposed by subtitle A for the taxable year.

3. Section 6401 of the Internal Revenue Code, 26 U.S.C. 6401, provides in relevant part:

> (a) The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

(b)(1) If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, and D of such part IV), the amount of such excess shall be considered an overpayment.

* * * * *

4. Section 6402 of the Internal Revenue Code, 26 U.S.C. 6402, provides in relevant part:

(a) In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c) and (d), refund any balance to such person.

(b) The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

* * * * *

5. Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511, provides in relevant part:

(a) Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b)(1) No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) (A) If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

* * * * *

6. Section 6513 of the Internal Revenue Code, 26 U.S.C. 6513, provides in relevant part:

(a) For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.

(b) For purposes of Sections 6511 and 6512—

(1) Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of

the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

(3) Any tax withheld at the source under chapter 3 shall, in respect of the recipient of the income, be deemed to have been paid by such recipient on the last day prescribed for filing the return under section 6012 for the taxable year (determined without regard to any extension of time for filing) with respect to which such tax is allowable as a credit under section 1462. For this purpose, any exemption granted under section 6012 from the requirement of filing a return shall be disregarded.

* * * * *

(d) If any overpayment of income tax is, in accordance with section 6402(b), claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year (whether or not claimed as a credit in the return of estimated tax for such succeeding taxable year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year in which the overpayment arises.

* * * * *

7. 26 C.F.R. 301.6402-3 provides in relevant part:

(a) In the case of a claim for credit or refund filed after June 30, 1976—

* * * * *

(5) A properly executed individual, fiduciary, or corporation original income tax return or an amended return (on 1040X or 1120X if applicable) shall constitute a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return (or amended return). For purposes of section 6511, such claim shall be considered as filed on the date on which such return (or amended return) is considered as filed, except that if the requirements of §301.7502-1, relating to timely mailing treated as timely filing are met, the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return (or amended return) was mailed. A return or amended return shall constitute a claim for refund or credit if it contains a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return (or amended return) is filed. If the taxpayer indicates on its return (or amended return) that all or part of the overpayment shown by its return (or amended return) is to be applied to its estimated income tax for its succeeding taxable year, such indication shall constitute an election to so apply such overpayment, and no interest shall be allowed on such portion of the overpayment credited and such amount

shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.

* * * * *

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No. 98-1667

IN THE
Supreme Court of the United States

DAVID H. BARAL,
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v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

The Brief for the United States[1] in this case for the most part is not responsive to the argument made by the petitioner, misstates the petitioner's position on essential matters, and trivializes *Rosenman* v. *United States*, 323 U.S. 658 (1945), a decision of this Court addressing the question now before the Court.[2]

[1] Hereinafter, that brief will be referred to as "G.Br."; petitioner's original brief will be referred to as "P.Br."; 26 U.S.C. will be referred to as the "Code"; and the Joint Appendix filed in the court of appeals below will be referred to as "Cir. J.A."

[2] It is plain, we believe, that the petitioner's argument is not based on equitable tolling of the Code limitations provisions. Mr. Baral filed his 1988 income tax return late, and there is no dispute about that. Footnote 2 of the Government's brief, page 2, parsing in detail Baral's deposition (in which he represented himself *pro se*) serves no purpose unless it is designed to suggest that Mr. Baral is unworthy and therefore should not recover his overpayment of income tax.

I. THE *ROSENMAN* CASE HOLDS THAT PAYMENT DOES NOT OCCUR UNTIL THE DETERMINATION OF A DEFINED LIABILITY BY EITHER THE TAXPAYER OR THE GOVERNMENT

As set forth in petitioner's original brief, the facts of this case are, in all significant ways, indistinguishable from the facts of *Rosenman* v. *United States*, 323 U.S. 658 (1945). In both cases, taxpayers remitted amounts to the Government prior to filing returns for the period to which the remittances related. The remittances were made more than three years prior to the claims for refund, and the Government rejected both claims on grounds that the remittances constituted "payment" beyond the limitations provision requiring payments to be made no more than three years before the filing of the claim for refund.

In *Rosenman*, this Court rejected the Government's argument on the ground that, at the time of the remittance, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted." 323 U.S. at 662. In other words, neither party had then defined or asserted a tax liability, whether by the taxpayer's filing a return ("self assessment") or by the Government's assessment or other assertion of liability.

Precisely the same situation exists here. Until the time of the refund claim itself (taxpayer's late-filed return), the Government did not assert a taxpayer liability, and no such liability was "self-assessed" by the taxpayer. Until the return, in the words of this Court, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted." Not until then did the government transfer Mr. Baral's remittances, to the extent required to pay the tax, from suspense status[3] and apply them

[3] This Court noted in *Rosenman*, "The Government does not consider such advances of estimated taxes as tax payments. They are, as it were, payments in escrow. They are set aside, as we have noted, in special suspense accounts established for depositing money received when no assessment is then outstanding against the taxpayer." 323 U.S. at 662.

against his defined income tax liability. In the *Rosenman* case (after crediting of the remittance as payment to the extent of the liability shown on the return) the Government assessed an additional liability in the form of a deficiency. Again in the words of the Court, "In any responsible sense payment was then made by the application of the balance credited to the petitioners in the suspense account and by the additional payment" by taxpayer. 323 U.S. at 661-62.

Rather than admit that *Rosenman* turns on a principle equally applicable here, the Government minimizes the Court's decision by limiting its applicability to a supposedly special consensual "arrangement." However, the "arrangement" in *Rosenman* consisted of a remittance to avoid penalties and interest. Here Baral also paid estimated tax only to avoid penalties and interest.[4] The Government in the *Rosenman* case put the remittance in a suspense account until assessment. The Government in the *Baral* case reflected credits for withholding taxes and estimates in Baral's account until Baral's income tax return was filed. Cir. J.A. 28-29. There is no significant difference in the procedures followed in the two cases.

We also do not understand why the Government brief contends that the parties in *Rosenman* acted by "consensus." The Government's litigating position in *Rosenman*, arguing for a payment of estate tax in the first remittance so that the limitations provision would apply, shows a total lack of consensus.

[4] Somewhat like the Cheshire cat that vanished leaving only a smile, the requirement of estimated taxes disappeared in 1984, leaving only penalties for failing to estimate or underpaying estimates.

The *Rosenman* case plainly holds, with good sense, that a tax cannot be paid until the amount of it is calculated, defined, and known. Until then, a taxpayer does not "discharge what he deem[s] a liability nor pay one . . . . asserted."

II. THE GOVERNMENT MISSTATES THE PETITIONER'S POSITION

A. The Petitioner Did Not Ignore Sections 6511(b) and 6513(b) of the Code or the Treasury Regulations Bearing Thereon

"Petitioner is wrong in ignoring these controlling statutory provisions . . . ," the Government asserts, referring to Code sections 6511(b) and 6513(b). G.Br. 5. Further, "petitioner failed to comply with the *regulatory* prerequisites for a 'deposit' to be accepted by the United States." G.Br. 6 (emphasis added).

Far from "ignoring these controlling statutory provisions," the petitioner's brief reviewed and analyzed them possibly to excess, devoting a section of six pages to section 6513(b) alone. P.Br. 10-16. That the Government may not agree with our analysis does not cause that analysis to disappear. Rather, it is the Government that has disregarded the plain language of section 6513(b), preferring to treat the deemed payment date for *withholding* and *estimated* taxes as the date of payment of *income* tax.

The Government has also disregarded and failed altogether to mention pertinent Treasury Regulations, 26 C.F.R. §§ 301.6315-1 and 301.6402-3(a)(1), preferring to elevate IRS Revenue Procedures ("Rev. Procs.") to regulations status which, as administrative practice releases, they do not achieve or deserve. *See* 8, n.5, below.

B. The Government's Analysis of Income Tax Liability Has Little to Do With the Case

The Government brief proves at some length that taxpayers have an obligation under the Code to pay income taxes whether or not those taxes are assessed. We certainly do not dispute this. The obligation comes into existence at the end of a taxable year since up to the last day of the year income previously received during the year may be offset by expenses, losses, and deductions.

The Government does not discuss the significance of income tax returns, required by Code Section 6012. Under the 1939 Code, income tax returns were due two and one-half months after the end of a taxpayer's taxable year. 1939 Code §53(a)(1). This period was extended to three and one-half months in the 1954 Code (1954 Code § 6071 and 26 C.F.R. § 1.6072-1(a)) after several groups and associations pointed out the need for more time to collect tax data, prepare returns, and ascertain taxable income and the tax. Hearings Before the House Committee on Ways and Means, 83rd Cong., 1st Sess., Pt. 1, 330-34 (1953). The liability for income tax may exist before a return is filed, but it is undefined and inchoate until a return can be prepared.

If the implication of the Government's demonstration that taxpayers have tax liabilities is that any remittance before a return is filed (and liability is stated) or before the Government asserts a specific liability is a payment of that liability, the contention obviously goes too far. On such a doctrine, the opinion and judgment in *Rosenman* v. *United States*, 323 U.S. 658 (1945), would simply be in error. When the testator died in that case, an undetermined estate tax liability arose immediately. Under the Government's view, as we understand it, the first remittance to the Treasury by the executors would be inher-

ently a payment of the unknown estate tax liability owing, and this Court would be wrong in its analysis and decision. The Government's contention is a great deal less than persuasive; not all remittances are payments of tax liability, and certainly not where the liability is unascertained and unknown at the time of remittance.

C. The Government's Argument That Assessment Is Unrelated to Payment Is in Error

The Government asserts that assessment is essentially unimportant in tax matters, providing only ancillary tax collection possibilities. G.Br. 6, 12. Apparently in the Government's view assessment follows payment. If this view is correct, the petitioner and some courts favorable to the petitioner have been seriously misled by the opinion in the *Rosenman* case. There the executors transmitted funds on December 24, 1934. However, in the words of this Court, "[t]he action here complained of was the assessment of a deficiency by the Commissioner in April 1938. Before that time there were no taxes 'erroneously or illegally assessed or collected' for the collection of which petitioners could have filed a claim for refund. The amount then demanded as a deficiency by the Commissioner was, so the petitioners claimed, erroneously assessed." 323 U.S. at 661. As the Court further noted, "on December 24, 1934, the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. . . . The tax obligation did not become defined until April 1938," that is, not until assessment. 323 N.S. at 662.

The petitioner may also have been misled by the recent decision in *New York Life Ins. Co.* v. *United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). There the court of appeals dealt with remittance of $31,912,823 in tentative settlement of an income tax dispute with the Government, subject to

a right of the taxpayer to file a claim for refund. When the Government failed to assess the remittance within the time permitted by the statute of limitations on assessments, the court of appeals held that (1) the remittance was a "deposit," not a "payment," and (2) the taxpayer could recover the remittance under the Tucker Act (28 U.S.C. § 1491). In its holding of "deposit" rather than "payment" the court followed the *Rosenman* decision. 118 F.2d at 1556-57. Obviously the Court of Appeals for the Federal Circuit did not regard assessment as a clerical matter of no great consequence; failure to assess timely cost the Government a very substantial sum of money. While this Court, in denying a writ of certiorari in the *New York Life* case, did not affirm the circuit court, the denial hardly constitutes disapproval of the circuit court decision.

In response to the *New York Life* decision, the Government has cited *Moran* v. *United States*, 63 F.3d 663 (7th Cir. 1995), as rejecting the contention made in the later *New York Life* decision. G.Br. 14, n.8. The *Moran* case does have a bearing on the question of when payment of a tax is made, but it does not lend support to the Government's position. In *Moran*, the taxpayers recognized and declared expressly that they were paying their income tax in an amount asserted by the IRS and that they were *not* making a "deposit." In effect the taxpayers "self-assessed" themselves. *See* 63 F.3d at 664-65, 668-69.

Where payment is made with an income tax return, assessment may be deemed to be virtually automatic, and a brief interval for making the assessment may be bridged by a realistic application of the rule of *nunc pro tunc*. *See* Code § 6201(a)(1) (where a tax is shown on a return, the IRS is authorized to assess forthwith). However, the Code does not authorize payment by an em-

ployer of withholding taxes to be assessed as an income tax payment by the employee; such a payment gives rise only to a credit on account of the income tax. Code § 31. The credit becomes payment when it is applied to the income tax shown on the employeee's income tax return. Similarly, as the Treasury Regulations provide, payments of estimated income tax are "payments to be applied against the tax shown on such [taxpayer's] return." 26 C.F.R. § 301.6315-1; *see also* 26 C.F.R. § 301.6402-3.[5]

Finally, we note that an alleged issue of "payment" versus "assessment" has no significance or impact in the Baral case. In accordance with the Code, the Treasury Regulations, and the IRS' actual practice in this case, payment of 1988 income taxes occurred at the filing of Mr. Baral's income tax return on June 1, 1993. Assessment was made on July 19, 1993. Either date is timely under Code Section 6511(b)(2)(A), since the claim of overpayment was made in the tax return filed on June 1, 1993. Therefore, the three year look-back limitation on refund or credit in Code Section 6511(b)(2)(A) does not apply.

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[5] The Government's brief omits any discussion of or references to these Treasury Regulations which have the force of law. Instead, the Government suggests that IRS Revenue Procedures are authoritative directives, even though taxpayers other than tax professionals may be generally unaware of Revenue Procedures, which simply reflect IRS administrative practice. *See Helvering* v. *New York Trust Co.*, 292 U.S. 455, 468 (1934) (IRS rulings "have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of law"); *Snap-On Tools, Inc.* v. *United States*, 26 Cl. Ct. 1045, 92-2 U.S.T.C. (CCH) ¶ 50,425, p. 85,432 (1992) (a Revenue Procedure "simply announces the IRS position on the issue; it lacks binding precedential value on this Court").

D. The Government Has Failed to Respond to Petitioner's Analysis of Code Section 6513(b)

The Government's brief fails to respond to petitioner's contention that section 6513(b) sets the income tax return due date as the deemed date of payment of withholding taxes and income tax estimates, not payment of the income tax. Withholding taxes under Subtitle C of the Code and estimates are not component parts of the income tax. They simply give rise to credits, becoming payments of the income tax due when that tax is ascertained, known, defined or asserted. The Government repeatedly refers to section 6513(b) as dealing with the "payment of tax" or "payments of tax," apparently content with payment of any kind of tax, whether or not income tax. *See, e.g.*, G.Br. 7, 10, 21, 28, 29.

The closest the Government comes to meeting the petitioner's argument on Section 6513(b) is a reference (G.Br. 29) to the Conference Report on the Current Tax Payment Act of 1943. H.R. Conf. Rep. No. 78-510, 78th Cong., 1st Sess. 54 (1943). The part of the Report which the Government quotes deals with estimated taxes only, not withholding taxes. It reads *fully* as follows:

> "The section further provides that payment of the estimated tax shall be considered payment on account of the income (including Victory) tax imposed by chapter 1 for the taxable year. *The taxpayer will, of course, have to file his regular income tax return as usual, and on such return the estimated tax paid will be taken into account.* All such payments of estimated tax are for the purpose of the provisions of law relating to refund or credit of the tax imposed by chapter 1, including the provisions relating to interest on overpayments of such tax, deemed to have been paid on the fifteenth day of the third month

following the close of the taxable year." (Emphasis added.)

It is significant that the estimated tax payment is referred to as payment "on account of" the income tax. This is the same language that appears in present Code Section 6315,[6] interpreted in the Treasury Regulations as requiring estimated tax payments to be entered on the taxpayers income tax return "to be applied against the [income] tax shown on such return." 26 C.F.R. § 301.6315-1. The section of the Conference Report quoted above makes it very clear that the estimated taxes will be "taken into account" when the taxpayer files his income tax return. If anything, the Conference Report seems to be the source for present Treasury Regulations section 301.6315-1. The Conference Report simply emphasizes and reinforces petitioner's position on section 6513(b). By application on the return, credit for estimated taxes is applied to the income tax to discharge or pay the tax *pro tanto* at that time. *See* Cir. J.A. 28-29.

The petitioner's argument on withheld taxes is at least as strong as the argument on estimated tax. Those employment tax payments constitute simply credits until they are applied on the return to the income tax. An attempt

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[6] In *Rosenman* v. *United States*, 323 U.S. at 660, the first remittance made by the executors which was, as this Court noted, in the nature of a cash bond, was described in the taxpayers' letter of transmittal as "a payment on account of the Federal Estate tax."

In the most recent decision on "payment" or "deposit," *Pransky* v. *IRS (In re Pransky)*, 84 AFTR 2d ¶ 99-5597 (N.J. Bankr. Ct., Nov. 3, 1999), the court followed *Rosenman* after considering in detail the Government's arguments and the split in circuit courts. There the taxpayers made remittances "to be applied to the account" of the taxpayers "for any income tax liability they may have for the year." Michael Saltzman, author of a treatise which the Government brief cites (G.Br. 13, 20), appeared as counsel for the successful taxpayers, obviously disagreeing with the IRS limitations arguments.

to label them payments of income tax on the deemed payment date is wholly unwarranted and unreasonable; the amount of income tax, absent a return, is then unknown.

Let us suppose, as some have advocated, that a federal sales tax or value-added tax should be enacted with a provision that such tax gives rise to taxpayer credits for income tax purposes. No one would seriously contend that the sales or value-added taxes thereby constitute integral parts of income tax, or that the payment of such taxes would be the payment of income taxes.[7] The case is not different for withholding taxes, classified in the Code as employment taxes.

E. The Government Erroneously Argues That a Late-Filed Return Prejudices the Internal Revenue Service and the Treasury

The Government suggests that the late filing of a return and late payment of a tax delays assessment and otherwise prejudices it. The realities are exactly contrary. Any detriment from late filing and late payment is sustained by taxpayers.

If the filing of the return or an audit results in a determination that tax is due, the taxpayer who files a return late is subject to substantial compound interest and penalty add-ons to the tax. Code §§ 6601 and 6651. On the other hand, if (as in the Baral situation) the return and audit show overpayment, the taxpayer loses interest

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[7] In petitioner's original brief the existence of forty credits against income tax was noted, with the observation that when they come into being they do not constitute payments of the income tax. P.Br. 22. In its brief, the Government simply sidesteps the existence and application of these credits by a meaningless and misdirected reference to the Conference Report on the Current Tax Payment Act of 1943, *supra*. *See* G.Br. 30, n.20.

on the overpayment until the return is filed and, of course, loses the use of the amount of overpayment (here for four years); in effect, the taxpayer has made an interest-free loan to the Government. Code § 6611(b)(3). In any event, the Government retains the right to audit the taxpayer's reporting for a period of three years after a late-filed return. Code § 6501(a).

Moreover, should there be a dispute between the taxpayer and the IRS, the passage of time may present a problem for the taxpayer. In a refund suit, the burden of going forward and the burden of proof are on the plaintiff-taxpayer. *United States* v. *Janis*, 428 U.S. 433 (1976). It is the taxpayer who years later may be in a difficult position to adduce documentary proof or testimony.

In his brief, petitioner presented a hypothetical case of late filing of a return and late payment of tax with no limitations question resulting from the lateness. P.Br. 26. The Government responds that the hypothetical case is not the *Baral* case. G.Br. 30, n.21. In the hypothetical, the taxpayers would pay the tax with cash transmitted with the return; in the instant case, the tax was paid by withholding and estimated tax credits. It is more than a little difficult to see how in the latter case the Government is especially prejudiced by holding an overpayment derived from withheld and estimated taxes for four years without paying interest thereon.

We are well aware that equitable considerations are not taken into account in applying the Code limitations provisions. It is nevertheless unwarranted to expand and over-extend the limitations provisions in this case so as to confiscate the taxpayer's overpayment. On a strict and literal construction of the Code provisions, the statute of limitations does not apply. *See* P.Br. 10-16. On a con-

struction which takes into account legislative history, the limitations provisions do not apply. *See* P.Br. 16-19. On an application of the doctrine of the *Rosenman* case, limitations do not apply. *See* P.Br. 24-26. The limitations simply do not apply in this case. Credits to be applied against the tax do not constitute payment of the tax before the amount of tax is ascertained or defined.

As this Court has recently declared, a statute of limitations does not begin to run against a party until that party has a complete and present cause of action and the right to bring suit. The statute does not commence until the amount of a claim sought to be enforced is known. *Bay Area Laundry* v. *Ferber Corp. of Cal., Inc.*, 118 S. Ct. 542, 546, 549 (1997). Baral had no cause of action, no right to bring suit, and no knowledge of the amount of his income tax or overpayment on April 15, 1989, the date on which the court below held that the limitations provisions began to run.

CONCLUSION

The petitioner respectfully requests that the summary judgment of the court of appeals below be reversed.

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